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1873

THE

General Council of Education

of the State of New York

Transcript of Report

of the

Committee on

Education

for the year 1872-73

1873

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767  
No. 2171

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
(*In Three Volumes.*)

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JAMES T. BARRON,

Appellant,

VS.

CLAIRE J. ALEXANDER,

---

Appellee.

VOLUME II.

(Pages 257 to 496, Inclusive.)

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Upon Appeal from the United States District Court for  
the District of Alaska, Division No. 1.

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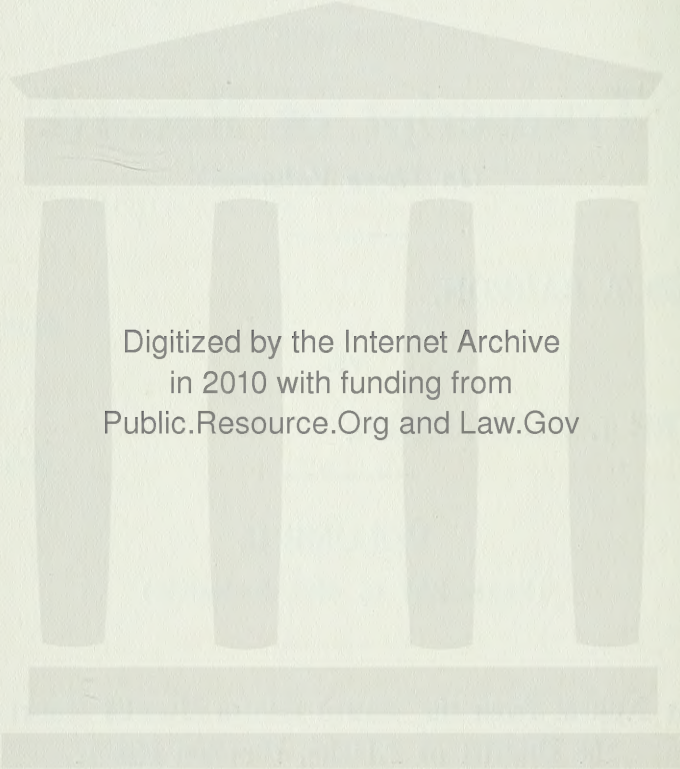
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(Testimony of James T. Barron.)

Q. (By Mr. JENNINGS.) Well, all right, if 'don't understand. What did you get this upland for, Mr. Barron?

A. I got it for a fish station and a mooring ground and to use—anything in our line of business.

Q. What do you mean by fish station? You didn't expect to put a cannery on there.

A. No, to use it for a fish-trap.

Q. That is what you got it for—a fish-trap?

A. Yes, sir; not only, have a station for my boats, and so forth.

Q. What is a fish station?

A. A fish station is where you have got your mooring grounds and harbor and you can build a station there in case you wish to have a house there for your fishermen or anything pertaining to the business.

Q. All right. Mr. Barron, you got this property on the 8th day of March, 1907, didn't you?

A. That is the deed.

COURT.—1908.

Mr. WINN.—1911.

A. The deed was signed at that time.

Q. (By Mr. JENNINGS.) What is the date of the deed?

COURT.—March 8, 1911. [235]

Q. (By Mr. JENNINGS.) You never did anything, from that time on, to put anything on the upland or to build a station there?

A. Because the upland was taken, and I didn't want to do anything to injure Victor Robertson's rights.

(Testimony of James T. Barron.)

Q. Victor Robertson never did anything?

A. No.

Q. But the Alaska Packers' Association never had anything?

A. But I got the Alaska Packers' rights before Victor Robertson's.

Q. The Alaska Packers first had it?      A. Yes.

Q. What did they do?

A. They built a fish-trap.

Q. Now, you wanted this upland because you thought the upland gave you a control of the tide land where you wanted a fish-trap?

A. I wanted too a mooring ground, or anything I wanted.

Q. Mooring ground. Have you got a mooring ground at your other traps?

A. No, because that is situated so closely to the cannery, that I wanted to make that without having any trap on it.

Q. Well, you are only five miles from Funter Bay anyhow. Why don't you run into Funter Bay?

A. Because you can't on account of the north wind. It is impossible to take a tow in face of the north wind.

Q. You mean to say that in towing logs to Funter Bay would get up as far as this little harbor and then the north wind would become so strong you couldn't get any farther?      A. Yes.

Q. Just get right up to this harbor and the north wind would increase in velocity so much you have got to run into the harbor?



(Testimony of James T. Barron.)

A. Yes; it surely does, if you will notice— [236]

Q. All right.

Mr. WINN.—That is all?

Mr. JENNINGS.—Yes.

Redirect Examination.

Q. (By Mr. WINN.) Now, Mr. Barron, I will ask you if five or six miles in a stiff head wind with a tow of logs is a considerable distance? A. Yes.

Q. Now, they have talked a good deal about if you couldn't run into Hawk Inlet. Now, as I understand, your boats generally come down this way and cut across here (indicating)? A. Yes.

Q. From this point. Now, then, how does the wind—withdraw that question—you started to explain once to Mr. Cheney as to how the wind, say, from the point—now, listen to my question—where survey 804 is down to Hawk Inlet, compared with what the wind is from survey 804 up to Funter Bay when there is a north wind blowing. Now, how is that on there?

A. The north wind blows at a tremendous velocity between these two points here (indicating).

Q. What two points?

A. This cannery—right down to say—

Q. Well, say between Funter Bay and—

A. Funter Bay and here it sweeps there, and this is a protection—this—this cove is headed between them.

Q. What cove is a protection?

A. This makes a rocky straight beach and that goes out westward, you see, and that helps the cove

(Testimony of James T. Barron.)

considerable in a north wind.

Q. Yes. [237]

A. The wind dies out, quiet about Point Augustine and he can cross over and come along this shore because the wind, north wind dies suddenly there, goes off here and can always come up here.

Q. As far as survey 804?

A. Yes, and then stop because it is impossible to face an ordinary north wind; it carries a big sea and fierce wind, so there is the place where the north wind reaches the highest velocity right along here.

Q. Then, as you answered this question of Mr. Jennings, this piece of property and this harbor in there is valuable to you for several purposes other than with your fish business?      A. Yes.

Q. Either for a trap, fish or mooring ground, building a trap?      A. Yes, sir.

Q. And those were the objects that lead you to take it up—this piece of property?

A. Yes; had it on my mind for years.

Q. Now, this part of Chatham Straits that is on the—the east side of the lead of this trap leads right out to the open sea, to the open straits, does it not?

A. Yes.

Q. Yes, sir.

A. There is—it is the ocean off from there and goes into a small bay and then the open strait.

Q. Now, I will ask you, Mr. Barron, what is it that makes this ground in and about the trap and between the trap and the peninsula marked “bare rock,” what makes that better anchorage ground than this

(Testimony of James T. Barron.)

out to the eastward of that?

A. Because you are closer to the lee shore.

Q. Does the tide there make this—carrying sand in there and [238] making it better bottom?

A. Yes.

Mr. CHENEY.—Very leading.

Mr. WINN.—Well, so it is.

Q. Mr. Cheney said to you that coming in around the point was a tremendous tide came in there and then sweeps off the bare rock. I will ask you if that tide coming in that way would have anything to do with making that better mooring ground?

A. Yes, it would.

Q. I say if the tide sweeps in there and strikes up against this peninsula and comes off—I will ask you if, Mr. Barron, on account of the tide coming in that line would have anything to do with making that ground better mooring ground?

A. Well, I suppose accumulates; evidently must be mooring ground there, because piles can be driven there.

Q. Now, Mr. Cheney was asking you something about if Mr. Barker didn't wire you something concerning Mr. Alexander's intention of building this fish trap before you got this deed from Robertson. I will ask you where Mr. Barker was when you got this deed from Robertson? A. He was in Alaska.

Q. When the deed was made out?

A. Well, he knew the deed was to be made out, but it was delayed. I went to Portland and I didn't get back to Seattle. The deed was made out for



(Testimony of James T. Barron.)

three or four days before that, but I had left. I had told Barker that everything was fixed and I had paid that—bought that from Robertson and that everything was settled. Knew of no danger; knew of nobody coming in and interfering with our station.

Q. Well, was Robertson present at that time when you closed this transaction with Robertson? [239]

A. Oh, yes.

COURT.—Barker.

Mr. WINN.—Barker.

A. I don't remember. He might remember. I don't remember all about it. I had filled it out and after getting the letter—I made out the deed, I think, in Portland. I think the deed must have been made about the first of March, and I said might be left up to George T. Myers'—the check with the money there as soon as Robertson executed the mortgage, I mean gave me the transfer.

Q. Yes. Now, I believe you stated in your direct examination, if not, I will ask you now as to what time of the year that you do mostly, about all of your towing of piles all down this coast of Admiralty Island? A. About the 1st of March.

COURT.—The witness has already testified to that.

WITNESS.—Yes.

Q. (By Mr. WINN.) Now, did I ask you what the prevailing wind was out there at this time?

A. In March?

Mr. CHENEY.—Why, you asked the witness that question.

(Testimony of James T. Barron.)

Mr. WINN.—Well, I didn't know whether I did or not.

Q. Now, Mr. Barron, you testified, I believe, in answer to a question of Mr. Cheney's that—about how far you would have to anchor out from the upland of this survey 804 in case that you would go in there with a steamer like the "Anna Barron," with a tow of logs. I don't know whether you answered that clearly or not.

A. You couldn't go there at all; impossible the way the trap is completed, completely cuts you out of a harbor.

Q. Indicate—how is that, Mr. Barron?

A. Because the trap is right across the harbor there. Put your [240] nose into it.

Q. About how far from your shore line of the homestead claim would you have to anchor out—

A. Have to.

Q. —with a tow of logs such as she usually carries and what length of rope have to have?

A. Well, of course, shorten your tow-line—she brings any piles up; if had five or six sections of piles averaging 100 feet apart, that is five or six hundred feet and you could shorten up your tow-line in the harbor and then the "Anna Barron" is 100 feet and the anchorage would be about 200 feet, perfectly safe 200 feet, and that would be about six or seven hundred feet have to have to be sure there in order to swing. The trap would be absolutely in the way. Couldn't do anything in there with a raft of logs at the present time.

(Testimony of James T. Barron.)

Q. Well, now, suppose you was going in there to seek shelter with the "Anna Barron" with a tow and it was in the night-time?

A. Wouldn't dare go in there.

Mr. JENNINGS.—Just a moment. I want to make a motion here at this time and I think might shorten things—that Judge Winn has devoted a great deal of time here to showing that he couldn't get in there with a tow of logs and that it would be a menace to navigation, and so forth, and it is good holding ground and a good harbor of refuge, all of which goes to the question as to whether or not this trap would be a menace to navigation, that hasn't anything to do with whether has a right to an injunction or not; whether this is a menace to navigation; whether you can get in there with logs or not; don't try this suit on that ground at all. What has that got to do with his ingress or egress from his upland to the water? [241]

COURT.—Well, it shows, I suppose, and that goes to that—what is meant by reasonable access is such access as will enable him to get in and out of whatever place he desires.

Mr. JENNINGS.—But then as to what about tows of logs, towing logs in there and getting in there as a harbor of refuge; not as to whether or not can get in there and moor up at a wharf.

Mr. CHENEY.—If that is a public harbor, any citizen in Alaska could bring the suit just as well as Mr. Barron, if it is a menace to navigation; that is a public right and have to prosecute this case as re-



(Testimony of James T. Barron.)

lator to the United States Government.

Mr. WINN.—Yes, sir, and I have alleged in the pleadings that he bought this for any and all purposes.

Mr. JENNINGS.—You don't want to get into your upland as a harbor of refuge; couldn't go to the upland; that isn't the point you are making for as a harbor of refuge. It is not to get to the upland; nothing to do with the upland.

Mr. WINN.—It is practically a harbor for the purposes I have pleaded it.

Mr. JENNINGS.—Well, I am going to move to strike it all out as irrelevant and immaterial to the issues of this case.

COURT.—The only object is it gives the Court enlightenment as to what is the reasonable access. Of course, I concur with you that the plaintiff has no more right than anybody else has, but if his evidence tends to show that his access has been obstructed or has been obstructed by the defendant, the evidence may go in for that purpose and that is the only purpose for which it will be considered. [242]

Mr. CHENEY.—Another proposition, if the Court please, that might suggest itself. If Mr. Barron had that up, as Judge Winn says, and had actually used it for a harbor for logs, he could be enjoined by other people—if it is a good harbor, he would be obstructing the harbor. When a man owns the upland doesn't give him any right to the harbor. It is a public harbor. Everybody has a right to it.

COURT.—I will hear the evidence for the purpose

(Testimony of James T. Barron.)

indicated by the Court.

Mr. WINN.—I will state to the Court this, for the purpose of this evidence and so forth, since the ruling indicated now by your Honor, so you can see some of the purpose of this testimony: Since the ruling in the Hampton case a different condition of affairs existed in Alaska until—

COURT.—Since what?

Mr. WINN.—Since the ruling in the Hampton case there is a different condition of affairs and a different rule and which I will show that Hampton case doesn't apply to this—in a criminal case in the language that Judge Morrow used in the decision.

Q. Now, I will ask you if suppose you wanted to go in—to get into your upland—of course, you can't run the “Anna Barron” on the shore, but to go in there anywhere to anchor in front of your upland, in order to reach your upland with freight or anything you wanted to reach it for, now I want you to state as to whether or not, just with the “Anna Barron” alone, if you can go in there with any stress of weather, whether you can go in and anchor safely with this fish-trap the way it is constructed now?

A. No; I wouldn't dare to; wouldn't allow my captains to.

Mr. JENNINGS.—You went over that already three times. [243]

Mr. WINN.—That question wasn't asked, your Honor. I have asked in regard to reaching his upland. I believe I did ask him in the night-time; yes, sir. That is all.

(Testimony of James T. Barron.)

COURT.—Any further cross-examination?

Mr. JENNINGS.—Yes, sir. [244]

Recross-examination.

Q. (By Mr. JENNINGS.) Just a moment. Why, wouldn't you, Mr. Barron?

A. Because the current is too swift there, liable to be a swift current and in such waters when backing up or turning around will fetch up against the beach or the trap; haven't got room.

Q. I place my hand, for the sake of the record, on a point midway between the line of Mr. Alexander's lead and that easterly line—the easterly line of claim 804. I will ask you why you couldn't build a wharf obliquely, running to the east?

A. Well, I wouldn't be in front of my property; be in front of somebody else's property.

Q. You could do that?

A. I don't think so; might be able to drive a pile; I don't think so, because I think the Alaska Packers—

Q. Never mind about what you think. I am talking about what you know, not what you think.

Mr. WINN.—He answered the question, your Honor; said he thought he couldn't do it.

Q. (By Mr. JENNINGS.) I didn't ask what you thought. A. I would have to find out.

Q. If you know of any reason why you couldn't drive a wharf obliquely in the east, beginning at the point where I place my finger, as I now said?

A. Yes, but—

Mr. WINN.—That is the same objection, if it

(Testimony of James T. Barron.)

please the Court. I don't think that any proposition would compel Mr. Barron to wharf out in front of other people's property that isn't his. While your Honor may have held some persons may have, now he is saying obliquely going all in front of some other property. [245]

COURT.—I don't mean to say the requested questions will control the case. The object is to learn all I can how it is possible to get in there. For that reason he may answer the question.

Mr. WINN.—Exception.

Q. (By Mr. JENNINGS.) Do you know of any reason? A. I hardly think so.

Q. Do you know of any reason why you couldn't wharf out?

A. I am satisfied there is a reason that you can't drive piles out there, because the Alaska Packers had their trap in the same position as Mr. Alexander's and I understand from my foreman and my trap-men that is the only place you can drive piles in there; consequently, can't put a wharf except at that particular place where the trap is.

Mr. JENNINGS.—I move to strike that all out, because is trying to get something that somebody told him.

A. I knew it from my men who explained it to me.

COURT.—The testimony won't do any harm, Mr. Jennings. It may stand.

Q. (By Mr. JENNINGS.) All right. Then, that is all you know about it—what somebody has told you? A. I never drove a trap out there.



(Testimony of James T. Barron.)

Q. You never tried to drive a trap out there?

A. No.

Q. Don't know anything about the soundings out there?

A. Only what was represented to me by my men.

Q. Well, the soundings—no trouble as to water—there is plenty of water?

A. The water is very deep; there is 11 fathoms—you can see this map—11 fathoms of water right off there.

Q. Now, just a moment. Now, by driving a wharf that way, you would strike deep water quicker than—  
[246]

A. I don't know whether you can drive a trap.

Q. Wharf or landing. You know, Mr. Barron, that they drive wharves in some most inaccessible places; hardly any bottom; sometimes rock?

A. Yes.

Q. Not much trouble to drive a wharf and placing it—but a wharf or landing place for such boats as the “Anna Barron” and the “Kodat”—that doesn't have to have a very awfully strong wharf?

A. You mean to say that in building a wharf might face it on somebody else's property?

Q. Build a wharf so you can get into your 804?

A. That is because I wouldn't be able to go up there. The most reasonable way to build a wharf at the other end is where I have my level land where the beach is at the side.

Q. How is it?

A. That is I prefer that. I couldn't go over by

(Testimony of James T. Barron.)

anybody's property, and I wouldn't have the room there.

Q. (By Mr. BURTON.) What end is that?

COURT.—The easterly.

Mr. WINN.—The south end.

WITNESS.—The southeastern.

Mr. WINN.—Yes; call it the southeastern.

Q. (By Mr. JENNINGS.) I am not asking which is the most feasible, but you contend in the answer this is feasible—that would be the most feasible. Which is feasible?

A. From reports I have had no place you can drive a trap there; if can't drive a trap, can't drive a wharf unless you go to great expense and place them—simply hang them on the rocks.

Q. Even that can be done?

A. But a rather expensive proposition— [247]

Q. A little more expensive, but it isn't an impossibility at all?

A. Could put in an iron dock for that matter.

Q. Did you ever see the dock at Haines?

A. Rather an expensive dock—public dock.

Q. Well, docks are expensive any way wherever you go? A. Some are not as expensive as others.

Q. What do you think would be the difference in cost?

A. I would have to get the size, measurements and everything else.

Q. You never did do that?

A. I have got wharves, plenty of them.

Q. I say you never figured on what would be the

(Testimony of James T. Barron.)

difference in cost between building on your east end?

A. No, I didn't want it put there; that position is not as desirable.

Q. Well, the communication is where?

A. No; a high bluff right in front; can't get on to the water.

Q. The bluff doesn't run right down to the water?

A. Pretty near.

Q. A passageway all along the shore line—this passageway all the way from—

A. Oh, there is a passageway.

Q. —from one end of the claim to the other?

A. But quite perpendicular there.

Q. Well, you heard Mr. Hill's testimony on the stand here Saturday, didn't you?     A. Yes.

Q. You know this bluff stops about 125 feet before you get to the water?

A. I know about 100 feet for just a corner of that piece of ground it is all right, but I mean crossing from that to the end of my property.

Q. But you know if you build a wharf at the east end of your [248] claim and your buildings were down to the west end of the claim, can get to it very easily?

A. I don't think I could. I think would have to build a wharf—I think at high tide don't think you could walk from one to the other on the beach.

Q. You wouldn't swear to that?

A. No; I wouldn't swear to that. I never was there at high tide, but so close to it there is very little margin over there.

(Testimony of James T. Barron.)

Q. Yes.

COURT.—Any further cross-examination, gentlemen?

Q. (By Mr. CHENEY.) I just want to ask Mr. Barron about—if anyone was coming with a steamboat down Chatham Straits or up Chatham Straits, they wouldn't have to change their course to get away from this trap Mr. Alexander has in this cove?

A. No, you can't see the trap coming out until you get already, almost opposite, because it is in that cove and hid behind that reef and that bare rock.

Q. Then, this isn't any obstruction to navigation up and down Chatham Straits? A. No.

Q. Unless somebody wanted to go into the harbor?

A. No; unless somebody wanted to go into the harbor.

Q. Now, you know of a couple of traps that you have at the Kitten Islands where the "Georgia" and all other big boats have to change their course to get around your traps in Chatham Straits?

A. Well, it was, but the traps I have now at the Kitten Islands there is plenty of room on the outside there; doesn't run out so far; don't have to change their course because the "Georgia" doesn't run there now.

Q. He doesn't now? [249] A. Only—

Q. But they used to go in there?

A. Well, some of the boats did and some do yet; and got plenty of room for them too.

Q. When did you—when did you first decide to build a wharf out in front of your survey 804 and



(Testimony of James T. Barron.)

gave orders for the building of that wharf?

A. Well, after—at the instance of my counsel here.

Q. That was last year?

A. Yes; last year that—I was down below and I received a cable from Mr. Barker stating the fact that I had better protect my property and build a wharf, and I immediately gave orders to Barker to commence that for the protection of the property.

Q. To protect your property? Now, Mr. Barker telegraphed you to telegraph him that you intended to—

A. That Mr. Burton—

Q. — Wait a minute, Mr. Barron. It is a fact that Mr. Barker telegraphed you on the 28th of March, last year, or the 26th of March last year, and while this suit was on trial here in this court for you to telegraph him substantially as follows: “I intend to build a wharf in front of my survey 804-B. Assemble the piles and pile-driver number one or two” whatever it was “and begin the building of a wharf.” Or substantially words to that effect?

Mr. WINN.—Now, wait; that telegram is here, as I understand, on file, if your Honor please, and I ask that the witness be allowed to see the telegram.

Mr. CHENEY.—It is not on file because it was introduced and read by Mr. Burton but I didn’t insist on it going into the record and Mr. Burton put it in his pocket.

COURT.—If the witness doesn’t remember the contents of [250] the telegram—

WITNESS.—Well, I remember the gist of it.

COURT.—The witness says he remembers the gist

(Testimony of James T. Barron.)

of it. He may answer if he remembers.

Mr. WINN.—The telegram isn't as counsel has indicated. You see he is acting under advice of counsel, which, I think, would probably change it.

COURT.—Yes; the witness may see it.

WITNESS.—May I read it?

Mr. CHENEY.—Is this the one sent to Mr. Barker or Mr. Barron sent to him?

Mr. WINN.—This is the one Mr. Barron sent to him.

WITNESS.—Shall I read the telegram?

COURT.—It may be read into the record if counsel desires.

A. (By the WITNESS.) “Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804 Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters and that you are sending affidavit to this effect”; and I simply answered.

Q. (By the COURT.) He was directed to?

A. Yes, sir.

Q. (By Mr. CHENEY.) You wired him that you would?

A. Yes; certainly, begin operation immediately.

Q: You haven't that telegram—that is the one wasn't put in the record. It was handed to Mr. Burton?

Mr. WINN.—Want the two offered in evidence?

Mr. CHENEY.—Yes.

COURT.—Very well, may be received.

**[Defendant's Exhibit No. 1.]**

“Alexander vs. Barron —Deft’s Ex. 1—R. E. R.  
[251]

POSTAL TELEGRAPH—COMMERCIAL  
CABLES.

Clarence H. Mackay, President.  
TELEGRAM.

Received at  
Main Office, 126 Third Street,  
Portland, Oregon.

Telephones: Main 435

Home A1435

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

16.P/D8452

Design Patent No. 40529

E 5694 378

Telephoned to J. T. Barron.

“ by H. E.

“ at 8:15 P.

120 Z BT

55 Collect via Seattle, Wn.

Juneau, Alaska, Mar. 27, 1911.

J. T. Barron,

Wells Fargo Blg.,

Portland, Org.

Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804, Alaska, out and into deep and navigable waters Chatham Straits for

access from said upland to and into navigable waters and that you are sending affidavit to this effect.

FRED BARKER. 8:08 P. M."

**[Defendant's Exhibit No. 2.]**

"Alexander vs. Barron—Deft's Ex. 2—RER.  
POSTAL TELEGRAPH—COMMERCIAL  
CABLES.

(Postal Telegraph)

(Commercial Cables)

Clarence H. Mackay, President.

CABLEGRAM.

Registered Trade-Mark Design Patent No. 36369.  
The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

No.	Time	Check Paid	Route via
		Chg. Thlinket Pkg. Co.	

Send the following Cablegram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to. [252]

Portland, Ore., Mar. 28, 1911.

To Newark L. Burton, Atty. at Law,

Juneau, Alaska.

It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

JAS. T. BARRON."



(Testimony of James T. Barron.)

Q. (By Mr. CHENEY.) I understand you to say, Mr. Barron, that you were told or advised by Mr. Barker to say you were going to build a wharf or commence to build a wharf to protect your property?

A. I was not advised by Mr. Barker. I was advised by Mr. Burton, Newark L. Burton.

Q. Mr. Barker wired you. That was for the purpose of protecting your property? A. Yes, sir.

Q. You had no cannery buildings on this location at that time?

A. No; but it was my intention—

Q. Just answer the question. You had no buildings on the place at that time? A. No.

Q. And you weren't using it for any purpose in connection with the cannery?

A. No; I intended using it for that purpose.

Q. But I say at that time there was nothing on the property at all but a little bit of a shack?

A. Yes; intended to use it as a fishing station.

Mr. CHENEY.—That is all. [253]

#### Re-redirect Examination.

Q. (By Mr. WINN.) I believe you say you sent this telegram in pursuance to a telegram that you had received from Mr. Barker and which you took to be advice from your attorney who was acting on the trial of that other case, Mr. Barron? A. Yes.

Q. I believe that is all, your Honor. Oh, well, I might ask you the other question: Why, didn't you go on and build a wharf after that?

A. When—after this?

Q. After you got the telegram and after the trap

(Testimony of James T. Barron.)

was put in there.

A. Well, the injunction was dissolved and I concluded I would wait until I had perfected the title and had fully—of course, this late in the season I wasn't able to build any wharf after putting in that trap.

Q. Would the wharf do any good with the trap in there? A. No; not a bit.

Mr. CHENEY.—That is leading and calling for a conclusion.

COURT.—The witness has answered it. Anything further?

Mr. WINN.—Nothing now.

Q. (By the COURT.) I desire to ask you two or three questions, Mr. Barron. I don't think you need that map. Now, I understand you to say that prior to the time you laid any claim to the upland included and embraced within Survey Number 804 you used to pull into this harbor for protection from the winds? A. Yes.

Q. You used it for that purpose, and you think that this trap would be a menace to navigation in that cove because you and the public generally wouldn't have the same opportunity to [254] go in there as though the trap were not there?

A. No; of course, we couldn't go in there with a tow the trap being there, that would be an utter impossibility.

Q. Now, Mr. Barron, let me ask you this question: Do you think—I understand you to say that the trap is in about the same position, that is, in the same

(Testimony of James T. Barron.)

locality, as that put in by the Alaska Packers?

A. Yes. Of course, as near as I can judge.

Q. As near as you can judge? A. Yes.

Q. And I further understand you to say that it was about the only place within that cove where a trap could be constructed?

A. That is what I have been told by several people who had the building of the trap there; also my own men who had made soundings there.

Q. You think the trap is built in a workmanlike manner, do you? A. I think so; yes.

Q. Now, if you should prevail in this suit you would build your trap in the same place?

A. I suppose if going to build a trap there, have to put it there, because no other place.

Q. Now, if you had a trap there wouldn't it be just as difficult for you to get in to the upland as if another man had it?

A. I suppose it would. The question would be with me whether it would be better for me to have a trap there or use it for a mooring grounds.

Q. For a mooring grounds. Now, what is the purpose of your acquisition of this upland? Isn't it for the purpose of acquiring that upland in order to command the property in front of it for the purpose of a trap? Isn't that the sum and substance of this controversy? [255]

A. That is probable, outside the mere fact that I am able, you know, to use it for any purpose I wish.

Q. Yes; but I understood you to say that prior to the acquisition of this land from Robertson that you

(Testimony of James T. Barron.)

intended to locate this very place as a trap-site yourself?

A. But that was before Alexander had built his trap. I didn't know where the particular place was; whether could build at any other place or not; but it is evident from what I have heard that is the only place where it would be practicable to build a trap—just where the Alaska Packers were and where they are now.

Q. Well, then, any trap maintained in that vicinity, in your judgment, would cut off your right of access from your upland? A. Yes.

Q. To deep water navigation? A. Yes, sir.

Q. (By Mr. WINN.) Just a minute. I didn't understand your question, Mr. Barron,—one of them that you answered Judge Lyons about,—whether constructing or building a wharf is the sole purpose that you want the upland for?

A. I answered I wanted it for other purposes—fishing station, mooring ground, and so forth.

Q. And the question whether you would build a fish-trap there or build a wharf there, would depend on whether or not that you chose to use it for one purpose or the other purpose?

A. Yes; whichever I thought properly to my interest.

Mr. WINN.—That is all.

Re-recross-examination.

Q. (By Mr. CHENEY.) I would like to ask Mr. Barron what he means by mooring ground. Just



(Testimony of James T. Barron.)

explain what a mooring ground is, [256] Mr. Barron?

A. Well, a mooring ground, I suppose, is a dolphin driven there; you can anchor your scows or your boats or your pile-driver and also tie up your raft of pilings to. In case our boat was going down to get logs and the north wind was blowing wouldn't be able to get from there to Funter Bay, be able to moor his piles there and then go and get another tow, and not wait for the wind to subside, for the wind has been blowing the last week or two so as to make it impossible for us to bring our piles up.

Q. Now, Mr. Barron, isn't it a fact that all the traps you are operating are located up Chatham Straits and over on Icy Straits and none of them that you own are located east of this particular place or east of this harbor?

A. At the present time, yes; but I don't know what time I would, if I could, drive them at that end.

Q. I don't ask you to come on out somewhere else. Isn't it a fact that they are all located north and over towards Icy Straits and over here toward Point Retreat? A. Yes, at the present time.

Q. Yes. So if you wanted a mooring ground for scows like you have got over there at your cannery at Funter Bay, where you put your big scows up there for the winter, or if you wanted a mooring ground for them to stand or lie at docks, why would you want to go away off down Chatham Straits in the opposite direction from where your traps are located to locate it?

(Testimony of James T. Barron.)

A. If I had the upland I have the privilege of mooring my piles there which I wanted to several times, over there.

Q. Well we are not talking about piles, but scows?

A. Well, I may have scows over there and may give that direction. [257]

Q. Aren't your big scows moored or put on the beach this winter?

A. All on the beach or ways.

Q. Over at Funter Bay? A. Yes.

Q. Well, you have a dolphin farther in, past your cannery there, in the bay, haven't you? A. Yes.

Q. That is where you tied the "Anna Barron" and those boats up this winter?

A. Yes; when in the harbor.

Q. And I don't suppose you want to swear, Mr. Barron, that you consider that a good safe harbor for mooring grounds for the big scows—well, big boats only that can be tied up to that little wharf where the wind sweeps down?

A. Perfectly safe in a north wind.

Q. But the prevailing winds are from Icy Straits and the southeasters. No wind except that wind?

A. Well, when we do—well, most of our towing is in March.

Q. But when you do your towing—I am not talking about towing; I am talking about a place where you put your big scows and anchor them?

A. I don't say I was going to anchor all my scows, but I say if I wanted to I could there; have that right.

(Testimony of James T. Barron.)

Q. And the only time—but first, it is in the winter that the north wind blows? A. Yes.

Q. Well, at the present time and during the summer and fishing season, Mr. Barron, that harbor wouldn't be safe at all for a boat of any kind?

A. No; it wouldn't be safe there in a southeast wind, unless had it tied up to something very strong. [258]

Q. Northwest wind or a southeaster?

A. There is a swell in there.

Q. What?

A. There is a swell in there. If got your mooring piles good and solid hold anything there, because you can tell by the entrance of that trap in there can't be very bad in there any time. The trap is a lighter than any we could build. In part is two by eight, very slight; so if a frame structure like that can stay all winter it is not very bad in there any time.

Q. The Alaska Packers went out?

A. Just simply went out by gradually being eaten out by toredoes. Many piles standing there a long time.

Q. You are willing to say whether they were eaten up by toredoes? A. Well, we know that.

Q. As a matter of fact, you haven't been there very often, Mr. Barron,—you haven't been there very often?

A. I have been often enough. No business to go there very often, particularly matters in this connection.

Mr. CHENEY.—That is all.

(Testimony of James T. Barron.)

Q. (By Mr. JENNINGS.) Well, Mr. Barron, there is one thing I don't understand. There are three propositions you have mentioned you want that land for; one for a trap-site; another because this little cove is a good mooring ground; and another because you want to use the upland as a fishing station. Now, outside of mooring purposes and fish-trap site, what is a fishing station? What do you—what—

A. Well, if you had—

Q. —if you had no fish—if you had no fish-trap there and if—and if the mooring ground in question was out of the way entirely, what—what would make that a good fishing [259] station or why would you use that as a fishing station? Now, just cut out the fish-trap—put that out of your mind and put the mooring purpose out of your mind, and put a place for tow logs out of your mind. Would you still use that as a fishing station if you put all that out?

A. If you eliminated all that, wouldn't have any business there at all. This is my business. If you eliminated the logs we are towing, of course, wouldn't have to go in there to unload any logs, and if we didn't have a fish-trap there, needn't have a watchman or anybody around there. Be nothing there, of course.

Q. Well, then, if you take out—if you haven't got a fish-trap there and if you don't consider the mooring proposition and harbor of refuge, you don't want to build any wharf there at all if those things were out of the way, you wouldn't want to build a wharf there?



(Testimony of James T. Barron.)

A. Yes; if I wasn't interested in this country wouldn't need to go there at all. I think that is a foolish question.

Mr. WINN.—It is eliminating all possible things they could put it to.

WITNESS.—I might as well be in Portland.

COURT.—I think the question, Mr. Barron, counsel is endeavoring to ascertain just what you mean by a fish station. Now, he says eliminate the idea of a fish-trap; eliminate the other advantages of the cove or harbor, then what else do you want it for.

Q. Now, is there any other purpose?

A. Well, he says eliminate the harbor there for towing.

Q. Yes.

A. Well, of course, there is no purpose that covers the whole usage I have had for it. [260]

Mr. JENNINGS.—Well, that is what we wanted.

COURT.—Anything further, gentlemen.

Mr. JENNINGS.—Just a moment.

Q. And if you did have a fish-trap there you would build a house upon the beach as a place for the watchman to live there, that is about all there would be of the fish station? A. I guess so.

Q. You have got a shack or house upon the upland where your watchmen live. That is what you mean by fish station? A. Fish station.

Re-redirect Examination.

Q. (By Mr. WINN.) Now, there was one question you started to explain to Mr. Jennings. I suppose

(Testimony of James T. Barron.)

in the maintenance of this cannery business you are in that you should go down about Hawk Inlet, or any part of that country, and locate any fish-traps, and so forth, then in towing your fish in, your scows, and so forth, up this shore, would this upland and this piece of property be of any value to you?

A. Very valuable.

Q. As yet, I understand, you haven't any down there?

A. No, no; but the chances are as I need more traps I may have them down there; that is prospective.

COURT.—Will take an adjournment at this time, gentlemen, and reconvene at half-past seven. [261]

Seven-thirty P. M., March 18, 1912.

COURT.—Ready to proceed, Mr. Jennings, without Mr. Cheney?

Mr. JENNINGS.—Yes.

COURT.—Very well. Proceed.

Mr. JENNINGS.—I would like to ask Mr. Barron one or two further questions.

COURT.—Will you take the stand, Mr. Barron?

JAMES T. BARRON, plaintiff, heretofore duly sworn, being recalled, testified further as follows:

Cross-examination.

Q. (By Mr. JENNINGS.) Mr. Barron, have you got the telegram that Mr. Barker sent to you, to which the telegram you read this afternoon was a reply?

Mr. WINN.—Both introduced, Mr. Jennings.

WITNESS.—Yes.

Mr. JENNINGS.—No, the other wasn't; not this one.

(Testimony of James T. Barron.)

COURT.—I think so, Mr. Jennings.

Mr. JENNINGS.—I would just like to see it.

Mr. WINN.—I think so. Mr. Barker's and the reply. I think in the case before, your Honor. I think these are office copies, and would like to withdraw them.

COURT.—Very well, the Reporter can make copies of them and then be withdrawn.

Q. (By Mr. JENNINGS.) Now, who wired this telegram to Burton reading as follows—I withdraw that, Mr. Robertson—Mr. Barker's telegram—this reads as follows: "Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804 Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable [262] waters and that you are sending affidavit to this effect." You replied the next day, that telegram I just read being March 27, 1911, and on March 28, 1911, you wired to Mr. Burton, "Newark L. Burton, attorney at law, Juneau, Alaska. It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect." Now, is that the first time you ever told Mr. Barker you intended to build a wharf out there?

A. Well, it was on account of my counsel there advising me to protect my property by building a wharf, which I had a perfect right to do.

(Testimony of James T. Barron.)

Q. Your counsel advised you that it was necessary for you to protect your property by building a wharf there? A. Yes.

Q. If your counsel hadn't advised you to that effect you had no thought of building a wharf, did you, Mr. Barron?

A. Well, I had the wharfage privilege on account of owning the upland.

Q. Well, now, just answer my question. If your counsel hadn't advised you it was necessary to protect your property that you build a wharf, you wouldn't have thought of building any wharf out there, would you?

A. Possibly not that quickly or at the present time.

Q. You had no intention at that time of building out any wharf there until you got this telegram from Mr. Barker, did you?

A. I, of course, supposed that the uplands held everything in front of the property and naturally if I had to protect the property by building a wharf I had that privilege of doing so. [263]

Q. You supposed that owning the upland you had the right to wharf out and if it was necessary to protect your property why you would wharf out?

A. Certainly.

Q. But you didn't have any intention at that time, that is, before you got these telegrams, of building any wharf, did you?

A. Well, I might have intended to next season, but I didn't think it was so expeditious—as the occasion required on my part of jumping that location.

(Testimony of James T. Barron.)

Q. Mr. Barron, you didn't need—you didn't need any wharf there at that time in order to enable you to get it?

A. Well, I may have during the season needed the wharf; that was very early in the season.

Q. Yes, you may have needed the wharf if you had put a cannery there and a lot of other things there; of course, have to have a wharf to get in, but you didn't intend to build a cannery there then—you had no intention to build a cannery?

A. No; I had no intention of building a cannery, but I wanted a fish station there.

Q. You had no intention of starting a store—doing anything, except you intended to build a fish-trap out there and to build a place on the shore for the watchmen who take care of it, isn't that right?

A. I intended to build a fish-trap there if for my business interest or reserve the frontage for mooring grounds or build a fish station there or wharf, whichever I thought probably needed in my business.

Q. Well, now, Mr. Barron, you didn't imagine for one minute because you owned the upland nobody else could moor—could run into that harbor as a harbor of refuge. You didn't think the upland was going to give you any such rights as [264] that, did you?

Mr. WINN.—I object to that as calling for a conclusion.

COURT.—Objection overruled.

Mr. WINN.—Exception.

Q. (By Mr. JENNINGS.) You didn't under-



(Testimony of James T. Barron.)

stand that the owning of the upland would give you such control over the harbor that nobody could go in there?

A. I had the best expert advice and I had the uplands and I thought that I had the first right of doing anything I wanted to the property to navigable water.

Q. Yes, I understand, you thought you had—a good many people think that too. You thought that owning the upland gave you the right to build a fish-trap out there, didn't you?      A. Yes; or anything.

Q. And control over it?

Mr. WINN.—Let him answer the question now.

A. —or any other thing I wanted to do in front of my property.

Q. (By Mr. JENNINGS.) Yes; anything else?

A. Wharfage, or moorage, or anything else.

Q. But at that time you didn't want to do anything else but build a fish-trap, did you?

A. Well, I don't know; a lot of things considered that we have to in our business; that I can't act too impulsively.

Q. How is that? .

A. I say a lot of things in our business that can't act too impulsively about, do or come to me, conclusions, but this was forced upon me by the jumping of the trap and property and, of course, I wanted to protect my rights by building a wharf out there, as I had the right, I supposed, and have free access to the rest of my property.

Q. Well, now, do you want to build a wharf out there now? [265]      A. I do.

(Testimony of James T. Barron.)

Q. If this Court gives you this property are you going to build a wharf out there or a fish-trap?

A. I will build a wharf out there.

Q. What?      A. I will build a wharf out there.

Q. What for?

A. Well, that is, of course, to tie up my boats to or moor my piles to; anything pertaining to our business, if I get the premises.

Q. You don't need a wharf to tie up the boats?

A. If I have got the uplands there I have got the privilege of building a wharf out there—I will build a wharf.

Q. With nothing on the shore but a shack?

A. That is all right; can build several shacks if we wish to, that is my province.

Q. Well, do you intend to do it?

A. I can do it if my business requires.

Q. Do you intend to do it?      A. I may do it.

Q. You may do it, but do you intend to do it?

A. Well, it depends entirely upon how—how I feel about it if I have the privilege.

Q. How do you feel about it?

Mr. WINN.—I object to the question, if your Honor please. I don't know, of course, if he intends to do. I don't know how far it goes in a matter of this kind. If he is entitled to access to deep water, then that is the only question to decide in the case. Doesn't make any difference whether he intends or not now or any time or some other time. If he has access to deep water he has a right to do that whenever [266] he wants to. I don't think it is

(Testimony of James T. Barron.)

fair for the witness to do it, because there are a lot of conditions. Suppose he had a lot more fish-traps located down that beach somewhere and they towed up his fish, as he does with the "Anna Barron," he would want to go in there and tie up to the wharf. Why, he concludes these other traps are insufficient for his cannery, he may testify to that. Now, then, he says he hasn't an opportunity of looking into that—too many probabilities and improbabilities. I don't believe could enlighten the Court at all. If entitled to access to deep water has been obstructed, seems to me that is the only question in the case. What he may intend to do in the future. He says he is going for business there and anything that may develop. For all we know, as your Honor remembers that in the Hampton case we didn't get that case decided until the fish quit running—maybe some of Mr. Barron's other traps will stop running and he may want to go down there and put in a trap, or may not. Now, I don't believe it is fair to put it to the witness just exactly what he intends to do. I don't believe it will enlighten the Court any.

COURT.—Now, let us see the situation, Judge Winn. The plaintiff in this case is asking for injunctive relief; that the defendant be enjoined from maintaining the structures in front of his upland which he says precludes his access to the highway. It becomes certainly material then for the Court to know what sort of passageway he wants, if it doesn't know. Assume that because a man owns the upland if he owned it for two miles that he could prevent

(Testimony of James T. Barron.)

any structures in front of him regardless of whether or not he wants to appropriate that particular place and should be permitted to appropriate that particular place for a passageway to the highway. Then, [267] what Mr. Barron intends wouldn't be material; but the view that I take of the law is that it isn't a theoretical right of way that a man is entitled to. It is a practical one. One that he needs to appropriate. Then it becomes material to determine what he is going to do with his upland so that the Court may determine from all the evidence submitted whether or not the injunction should be granted at this time. That is the reason it becomes, in my mind, very material to know just exactly what the plaintiff's intentions are. What he wants, in other words, to have the trap removed for by mandatory injunction?

Mr. WINN.—Mr. Burton says he has some suggestions to make.

Mr. BURTON.—If it please the Court, the question in this case is whether or not they are cutting off our access to deep water. The question that he asked the witness goes to asking whether or not he intends to build a wharf. Now, I take it from your Honor's remarks, if the Court please, that his intention whether he intends to build a wharf or not has nothing to do with the case and, even restricting him as you said a while ago that he is not entitled to the whole water-front, nevertheless the same question exists whether this right of ours extends the whole width of the upland. So far as this question



(Testimony of James T. Barron.)

is concerned, here is a question that is put to the witness: "Do you intend to build a wharf at the point you claim your access is?" Now, that is the question they put to him. Now, I contend, if the Court please, that the littoral right, whatever that may consist of, whether it extends the full length of what he claims or not, makes no difference; if there is a littoral right in existence, if that littoral right is to only reach a point on his upland—don't reach the whole claim—then we have shown that the ingress and egress to Chatham Straits is just where this [268] fish-trap is. Now, whether he intends to use that access; whether he intends to use that right, makes no difference; that right exists in him; he can do what he likes with that right; it is a property; something existing in him by virtue of the ownership of the upland; and in this case, as we have tried to show your Honor, that there is only one available place where boats can possibly land to reach that upland. Now, then, is Mr. Barron compelled in order to hold that accessible spot where he can reach his upland to build a wharf—is the question now in this case; that is the point, if the Court please.

COURT.—Yes; that is the point, and in response to that, Mr. Burton, I hold that it is very material. If a littoral right is such a right that a man can transfer, as you say, and prevent everybody else from building in front of him, regardless of whether he wants to appropriate it or not, then the inevitable deduction from that is the man who owns the upland can prevent by mandatory injunction anybody build-



(Testimony of James T. Barron.)

ing or operating anything in front of him, regardless of whether he wants it or not. That is not the law and it has been so declared very positively in the case of Decker versus the Pacific Coast Company.

Mr. BURTON.—In the Decker case, if the Court please, you will remember that had been sold. If the Court will pardon me, a wharf had been built out by the littoral owner—

COURT.—Yes.

Mr. BURTON.— —Now, Decker brings a suit claiming they cut off the access to navigable water. The Court held him to show by the evidence or pleadings that they had cut off that access over the wharf that had been constructed; and the evidence also showed that there was a building immediately [269] in front of the Decker property, which according to that theory should have been removed by the trial court.

COURT.—The only construction that I can place upon the Decker case is that so long as a man has a way out to navigable water he cannot complain *if* anybody else that builds in front of him. If, therefore, he has upland that he has no use for and has no intention to appropriate, he has no reason for the existence of the right of way and no reason to ask a court of equity to provide a right of way for him when there is no evidence to sustain the necessity of such right. I think it is clearly competent. Objection overruled.

Mr. WINN.—We take an exception to your Honor's ruling.

(Testimony of James T. Barron.)

Mr. JENNINGS.—Please read that question, Mr. Robertson.

Q. (Read by Reporter.) How do you feel about it?

Q. (By Mr. JENNINGS.) Mr. Barron, how do you feel about it? How do you feel about it, Mr. Barron; how do you feel about it?

Mr. WINN.—Same objection.

A. I have forgotten the gist of the question before that.

Mr. WINN.—I don't know—taking up so much time.

COURT.—The question is whether you intend to build a wharf.

A. Yes; I intend to build a wharf.

Q. (By Mr. JENNINGS.) You do intend to build a wharf? A. I do. Let me—

Q. What for?

A. I have got a lot of combustibles and two naphtha boats, and I am going to put my combustibles there and have my gasoline boats there, instead of running to the cannery, instead of being around where I have got a plant worth a quarter of a million dollars. I will store it down there.

Q. You are going to build a wharf and house there on this spot [270] for the storage of combustibles?

A. Yes.

Q. By combustibles you don't mean explosives, combustibles, dynamite and things of that kind?

A. No; naphtha.

Q. Naphtha and gasoline? A. Yes.

(Testimony of James T. Barron.)

Q. Things of that kind. Why don't you keep them over at Funter Bay where you have got a good big harbor? A. Too congested at the peninsula.

Q. What are you doing with them now?

A. Well, I have got three gasoline boats there for this summer there and will use the distillate which is very low grade.

Q. How long have you been running the cannery at Funter Bay? A. For ten years.

Q. What have you been doing with your combustibles for the ten years?

A. I have never been running a gasoline launch until last year; never had any distillate until last year.

Q. When did you buy your gasoline launch?

A. Last year.

Q. What time last year?

A. Last spring I changed the "Kodat" into the "Buster."

Q. So, you have got a gasoline launch there that runs by combustibles? A. Yes.

Q. And in order to make your plant complete, Mr. Barron, you knew that by building a—by buying a gasoline launch, you would also have to build a wharf to—wait a minute—to give you access to some land on which you were going to build some bigger houses in order to store this distillate [271] for your gasoline launch? A. Yes.

Mr. WINN.—Object—incompetent, irrelevant and immaterial, and, if it please the Court, not proper recross-examination.

(Testimony of James T. Barron.)

COURT.—Objection overruled.

A. Have to build a wharf some place because have to get away from the cannery and might as well build there as any place else, because it is on our line to Icy Straits; only fifteen or twenty minutes passage from our regular course, run into that place and get out gasoline laid on them.

Q. What was the notice you put up on these piles; these three piles you put out there?

Mr. WINN.—Object to it.

A. I have already answered.

Mr. JENNINGS.—I am just further cross-examining.

Mr. WINN.—But I know he has answered it already. I don't care if he answers.

COURT.—He may answer.

Q. (By Mr. JENNINGS.) Well, if I had, I will ask him again; no objection to asking him again. What was the notice you put on these piles?

A. Location notice.

Q. As a fish-trap site?      A. Yes.

Q. Not as a wharf site?

A. Well, never has been our purpose to put up a wharf site; in fact, I didn't own the uplands—didn't own the upland until a few days before the site was jumped.

Q. Then, you didn't intend to build any wharf there until a few days before that trap-site was jumped? [272]

A. Well, I intended to build a wharf there if I have got the authority.

(Testimony of James T. Barron.)

Q. Did you ever apply to anybody for authority to build a wharf there?

A. Well, no; I didn't get the property only a short time before the trap-site was jumped, so, of course, I didn't need to do it.

Q. Did you ever tell Mr. Barker you wanted to build a wharf there?

A. Well, Mr. Barker is only one year in my employ and he was an inside man. He didn't do anything much outside.

Q. Didn't he know you wanted to build a wharf there?

A. Well, as far as the wharf was concerned, I wouldn't build the wharf, unless it was necessary, but I find it is necessary and I am going to build it if I have got authority.

Q. Necessary to protect your property?

A. Well, also, I am going—

Mr. WINN.—Wait, let him answer.

Mr. JENNINGS.—I want him to stop right now.

COURT.—Let him answer. Give the witness a chance.

A. I am going to use it to store combustibles there and eliminate so far as possible fire risks at the cannery.

Q. (By Mr. JENNINGS.) Five miles away from the cannery?

A. Well, it isn't coming from Icy Straits and these gasoline boats run to Icy Straits. It isn't three miles.

Q. Whenever you want distillate going way down there from Funter Bay?



(Testimony of James T. Barron.)

A. It isn't much out of the road; only takes a few minutes.

Q. Just read that question about two questions before that—where I stopped him. You say you wouldn't build the wharf unless it was necessary?

Mr. WINN.—That isn't his answer. [273]

Mr. JENNINGS.—Well, he goes that far.

Mr. WINN.—Let's be fair, if the Court please. Mr. Jennings can put that in much less time and not come back at the witness and ask him "Wasn't that your answer?" I think he ought to be fair to the witness.

COURT.—Yes; the witness answered something else in reference to that same matter, Mr. Jennings, but the witness may explain his answer to it when counsel asks him if he is going to build a wharf if necessary—can explain.

Mr. JENNINGS.—I was going to ask him another question when he said he wouldn't build a wharf unless necessary.

Mr. WINN.—You want to do all the talking.

A. It is necessary for me to build a wharf somewhere and I might as well build down there, because have to get away from the cannery and just as convenient down there as any place I know of, and as far as the few minutes' run down there—we go to Icy Straits and we can go down there—making the deflection and can have it on our wharf and supply our gasoline boats with distillate without any trouble at all.

Q. (By Mr. JENNINGS.) That is what you are

(Testimony of James T. Barron.)

going to do with this five acres of land you have got there instead of building a fish-trap?

A. I don't know that I would. Then, I can, of course, do what I wish with the upland and I think I will build a wharf there.

Q. You think you will build one?

A. Well, I will qualify that. I will say I am going to build a wharf there.

Q. Now, you are going to build one?

A. Yes.

Q. You are not going to have a fish-trap there at all? [274] A. No, not this year.

Q. And you are just going to convert that into a place to store combustibles and abandon the fish-trap idea all together? A. Yes.

Q. Isn't it much more valuable to you as a fish-trap?

A. It may be, but when a jumper comes along you want to protect your property; you want to get within your rights; and if I wanted to use that for a wharf and mooring grounds where I could keep my piles there, I think that is the valuable part of it, because the wharf wouldn't interfere with—with my harbor.

Q. Well? A. It wouldn't go as far.

Q. If it is necessary to protect your property from a jumper you will build a wharf, and if it isn't necessary, you won't?

A. Well, I am going to build a wharf there anyhow, because I need it; might as well build a wharf; have to build a wharf some place, and I am going to build it there for my combustibles.

(Testimony of James T. Barron.)

Q. Didn't you think it was a little strange that you should get a telegram from Mr. Fred Barker, your agent up here, going into such particularities as this: Burton asks—you knew who Burton was at that time, didn't you?

A. I did, certainly; my counsel.

Q. "Burton asks that you wire fully that it is your intention at once"—not sometime in the future, at once—"to build and construct a wharf from the upland embraced in survey number 804 Alaska out and into deep and navigable waters of Chatham Straits for access from said upland to and into navigable waters and that you are sending an affidavit to this effect." Didn't you think that was a little strange? A. No, I didn't. [275]

Q. —that Mr. Barker should wire you in such particularity as to at once wire your attorney in such particularity as that— A. No, I thought—

Q. —just when this case was on?

A. No; I thought that was to protect the property and all what we did was quite within my province of building a wharf there.

Q. You understood from that, Mr. Barron, that was for use in this suit, didn't you?

A. Well, a man if he is hit, you know, why he has to protect himself. A man hits him in the back, why naturally he has to protect himself—

Q. Yes.

A. —and it was the regular thing, for I also had a use for that wharf if I built it. It was my province

(Testimony of James T. Barron.)

according to the instructions of my attorney to follow his advice.

Q. Well, that wasn't your attorney. Fred Barker wasn't your attorney.

A. No; but Burton was my attorney.

Q. (By Mr. BURTON.) Attorney's name was mentioned in the telegram?

A. His name appears first, I guess, on the telegram. I wasn't to wire to Barker; simply to follow advice of my counsel in the matter. I was away, a thousand miles south, and I didn't know what was happening.

Q. (By Mr. JENNINGS.) And you mean to say now that it is your intention to quit the fish-trap—well, let me ask you a question, how many fish-traps would you say you had? A. Twelve last year.

Q. Twelve. Got any wharf to any of them from the shore?

A. Well, it isn't necessary, because no harbor at any of them.

Q. No harbor—no wharf at any of your fish-traps? [276]

A. This is the only harbor we have got there where it is a harbor.

Q. Are there men—are there watchmen living on the beaches—aren't there? A. Now?

Q. Yes. A. Certainly.

Q. Don't need any wharf to get to them at all?

A. Well, then, we have no—there is no protection there at all. They are all points and open channel.

Q. Not, but I am talking—I mean there is no

(Testimony of James T. Barron.)

reason why you should have to have a wharf when there is nothing on the shore but a watchman to protect the trap?

A. Well, but this is different. This is right close to the cannery—a protected harbor and I want, if I can't use it for a fishing privilege, I am surely going to use it for a harbor of refuge for my piling that I have to bring down from the south there. I have at least got ten traps to make this spring and that is of value if I never had a fish-trap there.

Q. Yes, but, Mr. Barron, you may not know it and maybe Judge Winn won't deny it, but you know—I will ask you, Mr. Barron, don't you know—if you don't know that the ownership of the upland wouldn't give you any right to the control of that harbor as a place of refuge to put in your logs? You understand that?

Mr. WINN.—Object—incompetent, irrelevant and immaterial; calling for a conclusion of law, if the Court please. Mr. Jennings says I may deny it. I am not testifying.

COURT.—Yes; that is asking the witness to pass on his legal rights, Mr. Jennings.

Mr. JENNINGS.—I guess that is all.

Mr. WINN.—That is all? [277]

Q. (By Mr. CHENEY.) I want to ask you a question. When you say you might build a wharf there to store gasoline and distillate that you use in your gasoline boats, of course, you would want to use that gasoline and distillate during the summer season while your boat was running? A. Certainly.



(Testimony of James T. Barron.)

Q. Well, now, if you had that stored down in this place that you call a sort of protected harbor, isn't it a fact that there would be days and days in the fishing season, summer season, when a southeaster would be blowing or a westerly be blowing or a northwester be blowing out of Icy Straits, up and down Chatham Straits, when you couldn't get in there to get that gasoline or distillate?

A. No, I don't think so. I think if the harbor—if it had a wharf there perfectly safe to go to the wharf and tie there almost any day.

Q. Even with a big southeaster blowing?

A. Well, even a big southeaster, unless some storm. Then possibly be delayed for twenty-four hours or so. I know by the trap there—if that trap can be built there must be a good harbor, no matter what winds are blowing.

Q. But if you wanted a safe place to store that stuff, why not build a little platform or wharf, which you could build much cheaper over there, right in that good harbor in Funter Bay where you have got your big scows kept there for the winter, anywhere in that bay, just safe enough distance from your cannery so would be no danger? Couldn't you build a wharf there much cheaper and much more protected?

A. No, I couldn't build a wharf there any cheaper than this place for there is so long—I would have to build a wharf there about two or three or four hundred feet, a thousand feet longer pretty nearly, to get to deep water. [278]

Q. But there are a great many places there in

(Testimony of James T. Barron.)

Funter Bay are better protected than this place you are talking about down here?

A. Our peninsula right on line.

Mr. WINN.—I object to that, if it please your Honor, suppose there are other places—maybe somebody else's or maybe on the prohibited territory within eighty rods, couldn't take up, but I don't care for it, only I don't think it is competent and material. I don't think it is.

COURT.—Make it just as short as possible.

Mr. CHENEY.—Just that one question now if I can get an answer.

A. I can build a wharf there just as cheap as any place right on 804, and be just as handy practically.

Q. Well, if your gasoline boat wanted to get gasoline some morning and was going up to brill your trap up towards Point Retreat, where you have three or four traps strung along toward Point Retreat or Lynn Canal, and your boat wanted to get gasoline, would it be handier for your boat to go down Chatham Straits the five miles in an easterly direction—want to go down there and come back?

A. Well, my boat don't brill at all.

Q. That is all right; then we will say if the boats were going up to these points?

A. Well, wouldn't have any business there except simply to make a trap and come back again.

Q. Well, I will ask you this: If a boat was going to get gasoline and make a trip in to Juneau here, wouldn't it be ten miles out of their way to go down to this place where the gasoline was located to get

(Testimony of James T. Barron.)

the gasoline? Now, isn't that so?

A. Maybe on a special occasion, but only once or twice a year would that happen. [279]

Q. But I say it would be ten miles out of the way if you were coming around this way to Juneau?

A. Well, Mr. Cheney, you don't understand me for you don't know anything about the cannery business. I have got propositions—I have got to have a line of traps below Hawk Inlet.

Q. Well, you haven't got any below Hawk Inlet?

A. That wouldn't make what I have in the future. I was out 20,000 cases last year on account of this jumping proposition—I outfitted for that.

Q. That is all right.

A. I intend to have traps down south there.

Q. You haven't got any?

A. I am going to have.

Q. You don't know?

A. I haven't got this wharf either, but I am going to have the wharf.

Q. You don't know whether you can get the traps?

A. Well, I don't know; that it my business.

Q. Well, that is all right, Mr. Barron, but the question was, that I asked you, if you did intend to take your gasoline boat out of Funter Bay and load with gasoline, and the boat was going to make a trip up, say, to that trap toward Point Retreat, or even around Point Retreat towards Juneau, wouldn't that be ten miles out of that boat's way?

A. Yes; that might be so, but I might have several traps down there just on my way, which I am going

(Testimony of James T. Barron.)

to have; which I expect to have, right down in line with this gasoline.

Q. I simply asked you if it was ten miles out of the way if the boat was going to come to Point Retreat?

COURT.—He answered that.

Mr. WINN.—He answered that three times.

[280]

Q. (By Mr. JENNINGS.) He asks what your intention is now. What was your intention at the time you brought this suit? Did you intend at that time to build a wharf?

A. I intended to build a wharf, if necessary, for my mooring grounds, for controlling the uplands, that is the waters abutting the uplands, and use that for a harbor while I was towing my piles and use it for any purpose my business called for.

Q. But at the time you brought the suit did you intend to build a wharf? You can answer that.

Mr. WINN.—I object to that. At the time the suit was brought it was shown that Mr. Barron was a thousand miles away from here and I don't know but what the evidence shows he didn't know the suit was brought until after it was brought. You see this complaint was verified by Mr. Barker and Mr. Barron was not here and I think it has been covered.

Mr. JENNINGS.—I will ask to prove the date.

Mr. WINN.—It seems that when one attorney cross-examines for a while, then the other starts in.

COURT.—If this was a jury case it would be different. I want to find out all I can about this suit and not only do I but any other court that passes

(Testimony of James T. Barron.)

upon it after I pass upon it, will probably want to know just exactly what the suit was brought for and what the intention was at the time the suit was brought.

Mr. BURTON.—I think he has testified to that, if the Court please, at least three or four times.

Mr. JENNINGS.—At the present time.

COURT.—But I don't know as that one matter has been gone into. Maybe it has.

Mr. BURTON.—At the time of the introduction of the telegrams, [281] if the Court please, Mr. Jennings asked that question at least ten times.

COURT.—It may be gone into.

Q. (By Mr. JENNINGS.) Mr. Barron, this suit was verified—the complaint in this case was verified on the 22d day of March, 1911. Now up to that time did you intend to build a wharf there? Did you have—up to that time, did you have any intention of building a wharf on this place?

A. When I took—let me explain for a minute—when I got the Alaska Packers' title to whatever preceding title they had to give, I was going to take the upland—I say that was taken by Victor Robertson, and before I could do anything with that I had to let it lie idle until I saw Victor Robertson and bought his title to the upland. For all the expert advice I had was that I was the owner, that I could get ingress and egress from the upland, to use it for any purpose for which I needed it for. I would be protected and that is why I bought it from Robertson. If—I was going to say, if I was going to take a trap there,



(Testimony of James T. Barron.)

simply use it for a fish-trap and were no protection or anything else I would have built the trap long before I got Victor Robertson's title, but I didn't want to take anybody else's property if he had a shadow of right to the land. I bought it outright from him and that was the reason I didn't build the trap there the year before, for I had the lease from the Alaska Packers, the right to do, because it is common right along for us to protect each other's rights and never interfere with each other's rights, locations, or what you might call it.

Q. Well, now, Mr. Robertson, will you read the question I asked of Mr. Barron?

(Reporter reads:) Mr. Barron, this suit was verified—the complaint in this case was verified on the [282] 22d day of March, 1911. Now, up to that time, did you intend to build a wharf there? Did you have—up to that time, did you have any intention of building a wharf on this place?

A. Build a wharf if it was necessary—if necessary for what—well, I told you about in the general pursuit of my business, fish business, having a fish station or ground where I could moor my piles in case of a wind; moor my steamers and get my steamers to the wharf, and put my combustibles, as I told you before, if necessary.

Q. Well, didn't you know at that time whether it was necessary or not to do that?

A. Might be one year bring conditions, you can't calculate on another.

(Testimony of James T. Barron.)

Q. You mean if it was necessary to protect your property?

A. We are increasing our plant right along.

Q. That is what you mean?

A. Well, we need upland and more traps. It is necessary for us to have more traps.

Q. Would you build a fish-trap on this site if Alexander hadn't jumped in there and built one before?

Mr. WINN.—I think he has gone into that.

Mr. JENNINGS.—Never will get through. If you will just let him answer.

Q. If Mr. Alexander hadn't jumped in there and built a trap you would have?

A. I might have; yes.

Q. You would?

A. I may have; yes; I don't know what might have occurred before I got up there.

Q. That was your intention?

A. I let that location go for years and never put a fish-trap there. [283]

Q. You would put a fish-trap there?

A. I testified as one of the assets I thought that I would acquire if I got the upland and the privilege of building a fish-trap, I would.

Q. That is the things you got it for?

A. One of the things I got it for; yes; one of the things.

Q. And the other thing was to build a wharf?

A. Yes; build a wharf.

Q. And if you could, do both?

(Testimony of James T. Barron.)

A. Well, yes, sir; I didn't know the angle that fish-trap would occupy when I wired to Mr. Barker to build a wharf there. Of course, it is impossible to have a wharf and run a fish-trap at the present angle they have got for their lead.

Q. It is possible?      A. It is impossible.

Q. (By the COURT.) It is impossible?

A. It is impossible to build a wharf with the angle the way the fish-trap is now and the angle the lead is on. It is impossible to have a wharf there at the present time, and have the fish-trap there, too.

Mr. JENNINGS.—That is all.

Mr. WINN.—Have you got any more, Mr. Cheney?

Q. (By Mr. JENNINGS.) Well, then, if you got this property, you would decide which to put there, a wharf or a fish-trap?

A. I would decide whatever my interest or whatever circumstances would be. I would do as I wanted.

Q. But at the present time you haven't decided whether you want a wharf or a fish-trap?

Mr. WINN.—He has answered that question a half dozen times.

COURT.—If he has, I haven't got his intention.

A. I told him I decided now to build a wharf; I have decided to [284] build a wharf there.

Mr. WINN.—Said a while ago he was going to build a wharf.

Q. (By Mr. JENNINGS.) If you get this property you are going to build a wharf?

A. I am going to build a wharf, yes.

(Testimony of James T. Barron.)

Mr. JENNINGS.—All right. That is all.

Mr. WINN.—That is all, Mr. Barron.

COURT.—That is all, Mr. Barron,

Mr. WINN.—Call Mr. Barker. [285]

**[Testimony of Fred Barker, for Plaintiff.]**

FRED BARKER, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Let's see—what are your initials, Mr. Barker? A. F.—Fred.

Q. Mr. Barker, I believe that it was you who verified this first complaint in this suit and came in here to see Mr. Burton about commencing the suit?

A. It was.

Q. You went over to see Mr. Cheney too about it, did you? A. I did.

Q. He told you he had been employed by Alexander? A. He did.

Q. Now, Mr. Barker, what—I believe the complaint is verified on the 22d, is it, of March?

Mr. JENNINGS.—22d.

Q. (By Mr. WINN.) 22d day of March. Where did you stay for a month or so prior to the 22d day of March?

A. We arrived here on the 8th day of that month.

Q. On the 8th day of March? A. Yes.

Q. How long have you been in the employ of the Thlinket Packing Company, the company of which Mr. Barron is president and, from what he says, the manager? A. This is the third year.

(Testimony of Fred Barker.)

Q. The third year. In what capacity have you been serving that company, Mr. Barker?

A. Superintendent.

Q. Superintendent. Your position—is it principally confined in and about the cannery, or is it outside, or both? [286]

A. I am in the cannery and I am also on the outside.

Q. Were you down at Seattle at the time that Mr. Barron closed the deal with Robertson to purchase this land embraced in survey 804? A. I was.

Q. Do you remember about what day it was of that year and the month that this deal was closed as between Mr. Barron and Robertson and when he had closed—I don't mean when the deed was made out—when the understanding was had between them that Barron was to purchase the site from Robertson?

A. On the first day of the month.

Q. First day of March, and you arrived here on the 8th? A. On the 8th.

Q. So, when was the first time you saw the deed to the property, Mr. Barker?

A. The deed from Victor Robertson?

Q. Yes, the deed from Victor Robertson. When did you get it up here from Mr. Barron, do you remember?

A. The deed was sent here to Mr. Burton, I think.

Q. You think it was sent here? A. I think so.

Q. To Mr. Burton, but the bargain for the purchase of the property was closed it seems between Robertson and Barron on the first of March before



(Testimony of Fred Barker.)

you left there?      A. Yes.

Q. Now, that was the same deed, I think, that was offered in evidence on the hearing in this case to dissolve the preliminary injunction?

A. To the best of my knowledge it was.

Q. Now, do you know Alexander, the plaintiff?

A. Yes, sir. [287]

Q. The defendant in this case?      A. Yes, sir.

Q. How long have you known him, Mr. Barker?

A. I think the first time that I met him to hold conversation with him was March the 14th.

Q. March the 14th. Where did you see him at that time, Mr. Barker?

A. On a pile-driver at this location.

Q. On a pile-driver at this location. You mean the location of the fish-trap?

A. Immediately opposite this survey 804.

Q. What was your occasion of being out there in front of this property at that time, Mr. Barker?

A. Mr. Alexander had been in Funter Bay with his pile-driver for a short time, we supposed seeking for an opportunity, favorable opportunity of driving there.

Q. Over there?      A. Yes.

Q. And when did you first find that he had gone down there to drive this location?

A. We saw him pass the cannery with his driver in tow.

Q. Where was Barron then, Jim, was he in Alaska or down below?      A. No; he was below.

Q. He was below. Well, now, you went over there

(Testimony of Fred Barker.)

then on or about the 14th of March, did you, to see what, if anything, Alexander was doing there?

A. I did.

Q. Did you see him there?      A. Yes; I did.

Q. Who was with him?

A. With him, doing the work?

Q. Yes; was any one with him or was he alone?

A. Oh, no; he had a crew of men.      [288]

Q. A crew of men, and what else?

A. And the pile-driver at work there.

Q. Had a pile-driver at work doing what, Mr. Barker?

A. Driving piles; driving piles there.

Q. Driving piles on what afterwards you ascertained to be a fish-trap he constructed?

A. The fish-trap; yes, sir.

Q. Did you have any conversation there with Alexander at that time?      A. I did.

Q. What was the conversation you had with him—what was the conversation, that is substantially, Mr. Barker, you had with him?

A. He asked me at that particular time, pointing to those old location piles, this—asked me if they were Mr. Barron's piles. I said, "Yes, there was a notice nailed upon the piles." He said, "Well, I will respect that."

Q. Said he would respect the notice?      A. Yes.

Q. Did you have any further conversation with him?

A. I told him that was one of Mr. Barron's locations and that we would proceed to protect it.

(Testimony of Fred Barker.)

Q. What did he say to that?

A. He expected to be enjoined, but he would thrash the matter out further in the court.

Q. How long did you stay there at that time, Mr. Barker?

A. Oh, probably a few minutes; may have been ten minutes, something like that.

Q. Now, this was on the 14th day of March?

A. 14th day of March.

Q. Had he driven any piles there before that?  
[289]

A. Driven about six piles, I should judge.

Q. Had about six piles driven?      A. Driven; yes.

Q. Do you know what date it was he left Funter Bay or passed Funter Bay with his piles going out there?

A. Going to this location, you mean?

Q. You said you saw him going past Funter Bay with his pile-driver?

A. Why, he probably did this work on that day; probably did this work on that same day; on the 14th.

Q. Was it on the 14th he passed by Funter Bay?

A. He passed out of Funter Bay; was in Funter Bay.

Q. Then, evidently had driven these piles on the 14th?      A. That is what I mean.

Q. Well, did you serve any legal notice on him at that time?      A. I did.

Q. Did he do any driving while you were there?

A. Yes.

Q. He didn't stop?

(Testimony of Fred Barker.)

A. Not at that particular time.

Q. And you stayed there about how long?

A. A short time.

Q. A short time?      A. A short time.

Q. Did you go over on one of Barron's steamers?

A. No; I went over on a small gas boat.

Q. Went over on a small gas boat. Now, when you left you went back to the cannery?      A. Yes.

Q. When were you out at that place after that, Mr. Barker? Well, I will withdraw that question—just withdraw that question, I will make it a little more chronological. [290] Then, you came back to the cannery. What next did you do in respect to this?

A. I came into Juneau; arrived the following day.

Q. That would be on the 15th?

A. On the 15th.

Q. And what did you do after you got into Juneau?

A. I cabled Mr. Barron to the effect that Alexander was driving at this particular place.

Q. Mr. Burton?

A. No; I cabled Mr. Barron.

Q. Where was he?      A. At Portland.

Q. And then did you employ any one to commence a suit while you was in here?

A. Yes; Mr. Burton.

Q. And then the present suit was commenced?

A. Yes.

Q. And the hearing. Did you have authority from Mr. Barron to institute the suit?      A. I did.

Q. Then, did you remain in town here until the

(Testimony of Fred Barker.)

hearing was had on the motion to dissolve the preliminary injunction, or did you go back to the cannery again?

A. I made several trips back and forth.

Q. Back and forth there. When was the hearing had the 28th, 28th or 29th?

Mr. CHENEY.—23d.

Mr. BURTON.—You mean the motion to dissolve.

Mr. CHENEY.—You got a continuance on the 26th.

Mr. WINN.—I don't care for that.

Q. Do you remember approximately what time you came in here to [291] be a witness on the hearing for the dissolution of the temporary restraining order. Do you remember approximately what day that was?

A. The 29th. I think, that was the 29th.

Q. The 29th. Did you go out to this fish-trap location or this little harbor in the meantime?

A. Several times.

Q. You had been out several times? A. Yes.

Q. And what was Alexander doing?

A. He had driven, I should say, as he himself testified—he said 50. I suppose there would be 43, about 43 piles driven in all up to the time of the hearing, March the 29th.

Q. You attended that hearing, did you, Mr. Barker? A. I did.

Q. Here is an exhibit, Mr. Barker, that was offered in evidence upon that hearing and marked Plaintiff's Exhibit "C" upon that hearing and it is marked



(Testimony of Fred Barker.)

Plaintiff's Exhibit "E" on this hearing. Do you remember having seen this exhibit upon the hearing for the dissolution of that temporary restraining order?

A. Yes.

Q. Now, and you had also been out to the ground where Alexander was driving and had seen what he had been doing?

A. I was present with Lloyd Hill directed—got his measurements and distances for making that plat.

Q. Oh, all right. Then, you—you went out to this place with Mr. Hill to get the data from which he made his exhibit, did you? A. I did.

Q. Did you help him make any soundings at that time?

A. I was present. I did not help him. I was present. [292]

Q. The measurement then you didn't know anything about?

A. I didn't make them myself. I was present.

Q. You didn't make them yourself but you identify the trap that had been put down there by Alexander and had it taken down according to representations made on this exhibit "E"? A. Yes; I do.

Q. Do you remember whether or not that at the time you and Hill were out there that Alexander had moved his pile-driver away and quit driving there on his trap?

A. Oh, no driver at that time; he had no driver at that time; the driver was taken away.

Q. Now, then, you attended that hearing upon the motion to dissolve the temporary restraining order and also testified on that case? A. Yes; I did.

(Testimony of Fred Barker.)

Q. And you was here and heard Mr. Alexander testify? A. I did.

Q. Now, what did Mr. Alexander state upon that hearing with reference to whether or not he had at that time completed his trap?

Mr. JENNINGS.—Object—incompetent, irrelevant and immaterial. Object as immaterial and irrelevant. This is a trial *de novo*. The question isn't what he said then or what he didn't state. The question is now have they got a right to a mandatory injunction, or whatever wants with it. I don't care what he testified to then or what the other things were then.

COURT.—I think it is myself, Judge Winn, unless it may become material as impeaching testimony after the defendant takes the stand if he does take the stand this time.

Mr. CHENEY.—Wouldn't be the best evidence any way. That case was reported—the evidence of it.

COURT.—I think any man who hears testimony in the court [293] room may testify.

Mr. WINN.—Well, are you through, Mr. Cheney? When you and Mr. Jennings get through I will try to say something.

Mr. CHENEY.—I wish to object for the same reason. What your Honor has heard in this former trial here, unless Mr. Alexander takes the stand, it doesn't become competent.

COURT.—That is my view of the matter.

(Testimony of Fred Barker.)

Mr. WINN.—It is for this purpose, if your Honor please, I think it is admissible for two purposes. In the first place, if it please the Court, we pleaded it in our amended or supplement pleading; they denied it; we say that Alexander came in here and testified at that time, if it please the Court, that he had completed his trap; upon that testimony there was a ruling made by this Court that disposed of that. A man who seeks the assistance of a court of equity must come in with clean hands. If it is true that this—

Mr. JENNINGS.—We will—

Mr. WINN.—Let me get through. Now, then, if it please the Court, that is the issue we have made and they have seen fit to join issue with us on it. Now, then, it is admissible for the purpose of showing the good faith, if it please the Court, when I am dealing with this court if an injunction is dissolved it ought to be placed somewhere in the record, if it please your Honor, upon what grounds and upon what testimony that injunction was dissolved; otherwise, if the Court please, suppose they should rest their case and not put any evidence in this case. Now, it gets before the Appellate Court on either side. Now, the Court says: Well, the lower Court ruled at a former time on this matter and indicated that an injunction shouldn't have been granted or made; and can't present any new phase of the case on this final hearing. You see it comes back doubly against us in that respect, and [294] another proposition, if it please the Court, as I was about to say, this man is supposed to come into court with clean hands, and if he had structures there,

(Testimony of Fred Barker.)

then he swore in this court and testified over and over again that he had completed that trap and didn't want anything else except what he had at that time. Now, notwithstanding the fact your Honor, but he goes ahead and violates his oath, and I say if the evidence as reported by the stenographer in this case is true, if Alexander swore to that which—I can prove—then Alexander is guilty of perjury, the rankest sort of perjury in this case and should be prosecuted for it. Now, if that is true in this connection, if it please your Honor, should that matter not come out? Now, it is true they can fail to put Alexander on the witness-stand, then I am left here to show that your Honor's ruling made before was not made on the—what is present at this time, new and different structures entirely; and if it please the Court, that he swore over and over again, if your Honor remembers, that insomuch as he wasn't going to put another line on there, we could go around there, and he extended it 200 feet. Now, that is going into the good faith. It is part of our allegation in this complaint and it is denied by them. Another thing it is permitted for us to substantiate the thing this witness is testifying to; that he went out there at that time and saw the structure as it was constructed and that he says the pile-driver was gone. Alexander comes in and testifies himself. Now, these admissions, if your Honor please, he noticed how the piling and how he had the fish-trap this witness could tell whether he had finished the trap,—now, that would come in having his admission and another purpose; and being part of



(Testimony of Fred Barker.)

our complaint, I don't think should be deprived of our proof before [295] the Court because, as you see, it rests with them, if they put Alexander on the stand. If can't put him on the witness-stand I can't try to impeach him, but I say aside from that impeachment, I think it is part of our case.

COURT.—No; I hardly think so, Judge. Now, let us see what the fact is. You are asking for a mandatory injunction. It doesn't make any difference what the Court based its ruling on before or whether the Court was wrong or right. You have to show a case now that will authorize this Court to grant you this relief. Now, what the defendant may have said cannot affect the question as to whether or not you need to have a right of way. When he takes the stand himself, then if he gives testimony which is in conflict with testimony that he gave last year, then it is competent for the purpose of impeachment, but it wouldn't make any difference what he testifies to; wouldn't make any difference how erroneous the ruling of the Court may be or what it might be based on if you don't make a case here, this Court can't give you relief whether the defendant swore truthfully or falsely on the last occasion; that would be immaterial.

Mr. BURTON.—Just one point, if the Court please, that I have in this matter.

Mr. WINN.—Part of our supplemental pleadings.

Mr. BURTON.—At the time we filed the complaint in the preliminary hearing, as I take it this matter is a proceeding which relates back to the commission of the act, that is, relates back to the bringing of the origi-



(Testimony of Fred Barker.)

nal complaint. Now, then, if the Court please, things have happened since the preliminary hearing which is set up in our supplemental complaint. An issue is made upon that allegation in the supplemental complaint. Now, I take it, if the Court please, that [296] these matters showing the changes in conditions from the time of the preliminary hearing to this time is certainly admissible just the same as any new conditions in any other suit where you are permitted under the code. You see now it isn't for the purpose of impeaching Alexander's testimony. It is for the purpose of showing the changed conditions from the time of the preliminary hearing in a court of equity up to this time. Now, I take it that a court of equity certainly has a right to go back and ascertain just what were the conditions at the time of the preliminary hearing and permit the testimony of things that have been changed.

COURT.—Mr. Burton, I haven't ruled you shouldn't show all the change of circumstances. I say you may by this witness or any other witness, but as to what the defendant said he was going to do is certainly not material at this time unless you may later seek to impeach him on it; but as to what he said he was going to do as to what he may have promised in court he would do, that doesn't and could not affect the physical features. No, gentlemen, let's not take up any time arguing that.

Mr. BURTON.—Wouldn't the question be proper, if the Court please, just for information, would the question be proper to this witness at the time of the

(Testimony of Fred Barker.)

preliminary hearing that he understood from the testimony of Alexander that the trap was completed except eight piles; not for the purpose of impeaching Alexander but for the purpose of showing conditions upon the ground at that time.

COURT.—It couldn't change the situation. This witness or any other witness can describe just what exists and what changes have taken place since. If you seek to show that now, why the Court should rule differently from what it did [297] before, that is competent, but when the Court comes to rule on this case to find out whether you make a case, of your own or not, well, as to what the defendant said on a former trial is absolutely immaterial. In your case in chief you have to make a case which will authorize this Court in granting the injunction to remove the structures from in front of you, and false promises on his part cannot affect your right in any way. When the time comes if it becomes material, I will give you plenty of time to prove that.

Mr. WINN.—Then, in order to get the record clear, if your Honor please, I now offer to prove on this feature of the case in support of our supplemental pleading in this cause and for other purposes that the defendant Alexander, in the presence of the witness who is now upon the witness-stand, testified upon the motion to dissolve the temporary restraining order that his trap was then complete with the exception of eight piles to then be driven by or to be driven in and about the pot and filler (spiller) and would not extend the lead any farther out or to get any

(Testimony of Fred Barker.)

nearer the shore line.

COURT.—You object to it.

Mr. CHENEY.—We object to it, if the Court please, on the ground that it is immaterial.

COURT.—The offer may be overruled in the view the Court takes of the question it is immaterial at this time what may have been testified to; cannot become material unless he takes the stand as a witness and then it may become material for the purposes of impeachment, but not in the plaintiff's case in chief.

Mr. WINN.—Then, I would offer for this one further purpose, your Honor, to show an admission on the part of the [298] defendant that the fish-trap at the time the witness is testifying concerning was in the same condition as the witness is going to testify that it was in case that the admission that the defendant made in court was admitted, which corroborates the testimony of this witness who is now on the stand, to show the truthfulness of the testimony that the witness is going to testify to.

COURT.—May be something in that.

Mr. CHENEY.—I don't quite understand that—to show the truthfulness of this witness.

COURT.—He is seeking to prove an admission made by the defendant which will corroborate this witness. I understand that is it?

Mr. WINN.—Yes, sir.

COURT.—I think that may be received. You object to it.

Mr. CHENEY.—Object to it, if the Court please. I, of course, haven't said anything in regard to this

(Testimony of Fred Barker.)

matter, but it seems to me that Judge Winn is getting a lot of stuff in this record entirely tending to prejudice Mr. Alexander in this case. Now, certainly Judge Winn can't contend there was any strings on that decision made by your Honor last year. He wasn't trying to mislead this court.

COURT.—Now, so far as prejudicing anybody, this Court is going to hear everybody and anybody.

Mr. CHENEY.—I didn't mean in this court. With all this stuff Judge Winn has stated about violating his promise—Mr. Alexander made no promise. We haven't asked to do this.

COURT.—That is Judge Winn's version. If it becomes material you can show your version of it.

Q. (By Mr. WINN.) Now, then, Mr. Barker, did you hear Mr. Alexander state when he was in court upon that preliminary hearing that the trap, as you have just described it and as you have indicated that it is on Plaintiff's Exhibit "E," was in [299] the condition at that time that you have described it was in and, if not, what exception or what explanation can you give in regard to it?

A. This is the condition that the trap was in at the date of the hearing, March 29th.

Q. And did you hear Alexander admit on the trial of that case that was the condition the trap was in?

Mr. CHENEY.—Object to that as leading, your Honor.

Q. (By Mr. WINN.) Well, did he testify to that in court?

COURT.—He may answer if he knows.



(Testimony of Fred Barker.)

A. He testified to that certainly.

Q. (By Mr. WINN.) Now, then, do you remember further, Mr. Barker, that Alexander further testified that there were to be eight more piles put in at the trap. He testified to that on the other trial?

Mr. CHENEY.—Object to that.

Mr. WINN.—I am just going to follow it up by showing that he went out and saw the trap lead.

COURT.—He may answer.

A. He testified that he would drive no more piles inshore from the direction of the lead as it was, and stated in cross-examination by his Honor, Judge Lyons, who presided there, a similar one, and he was asked the question by the Court as to whether or not the “Anna Barron” could go around there and then the Court stated that the defendant stated that the trap was complete.

Q. (By Mr. CHENEY.) That is your recollection? A. That is my recollection.

Q. (By Mr. WINN.) That is your recollection of his admission?

A. That is my recollection of his admission the second time.

Q. Well, now did he put any more piles—I will ask you this question: Did you hear him state on that hearing he expected to put eight more piles in the heart or filler (spiller)?

A. Eight more piles, but no more in the direction of the shore. [300]

Q. Now, I will ask you if you saw the trap again after he put those eight piles in? A. I did.



(Testimony of Fred Barker.)

Q. What time did you see it then, Mr. Barker?

A. March the 10th; I saw it for the first time April 7, 1911.

Q. Well, can you explain to the Court now about where he put those eight piles in, those additional eight piles, just approximately, those additional eight piles?

Mr. CHENEY.—Well, if the Court please, I object to that because this witness could not by any possibility know where Mr. Alexander drove those piles. He wasn't there and no possibility of knowing where he drove them.

COURT.—That is for him to say.

Mr. WINN.—You are not testifying; the witness is.

A. Counted it there; fifteen more piles driven in on that lead toward the shore.

Mr. CHENEY.—That wasn't the question and I object to it and ask that it be stricken out. He asked where those eight piles were driven—you know the eight piles?

A. I could not answer the question as to the eight piles.

Q. (By Mr. WINN.) I asked you if you had visited the trap after he put the eight piles in that he testified upon that hearing that he was going to put in? Did you see the trap?

A. I visited the trap April 7, 1911.

Q. Well, now, did you see any change in the condition of the trap in April when you visited it from its condition that you saw it in just prior to the hear-

(Testimony of Fred Barker.)

ing on the preliminary motion to dissolve—on the motion to dissolve the preliminary injunction?

A. I did. There were nearly eighty piles in the trap April 7th. The trap was then about completed.  
[301]

Q. Oh, I see. Now, then, when you went out in April then instead of seeing eight more piles in there, how many more piles did you see in the trap?

A. Well, I saw about eighty; eighty, all together.

Q. Eighty, all together?

A. Eighty, all together.

Q. That would be about forty-two or three, thirty-nine or forty in addition to what you saw before?

A. That would be about thirty-seven possibly.

Q. Well, now, when you went there in April what change in conditions particularly was there in that trap from what it was at the time of the hearing on the preliminary—on the motion to dissolve the preliminary injunction?

A. It was 260 feet longer in towards shore and the bulk of it was completed with a pot in the center and a spiller on either side. It was 130 feet in width—the front width.

Q. Now, was that extra lead put on there before the preliminary—before the hearing was had to dissolve that preliminary injunction or afterwards?

A. Afterwards.

Q. Now, I don't know, Mr. Barker, was he fishing the trap when you was out there in April? Was he fishing the trap? A. Not in April.

Q. Didn't have his web strung? A. No.

(Testimony of Fred Barker.)

Q. Didn't have his web strung?     A. No.

Q. Now, did you go out there with Mr. Hill here on the 11th of this month when he went out there to put on these additional piles?     A. I did. [302]

Q. You went out there?     A. I did.

Q. How did you find the fish-trap there when—I refer to the fish-trap, I mean, of course, the lead and everything that goes with it to make the trap—with respect to the condition it was in when you was there in April?

A. It was in approximately the same condition. There was very few piling out.

Q. Been very little change made in the condition over the winter. Very well. I will ask you if you heard Mr.—don't answer this question until the Court rules upon it. Maybe it may come under the head, your Honor—so with—did you hear the witness Alexander testify on the occasion of the motion to dissolve the temporary restraining order and did he testify substantially that the reason that that wouldn't block Barron's way to the upland was because that he wouldn't extend his lead any farther than the bunch of piles that is marked on exhibit "D," than the little cluster of piles that is indicated "Barron's piles"?

Mr. JENNINGS.—We object to that, if the Court please, for the same reason; incompetent, immaterial and not the best evidence.

COURT.—I think that is true. I think the objection should be sustained.

Mr. WINN.—All right. If your Honor please,

(Testimony of Fred Barker.)

I will take an exception. I will make a brief offer. We offer now to show by the witness that Alexander testified upon the hearing at that time and gave his reasons for testifying to it was that his trap, as then constructed, it did not block the way of Barron to his property or ingress or egress from that property to deep water for the reason that he had left a distance of some three or four hundred feet from his lead to [303] the line of ordinary high tide in which boats could pass in and around his trap and get to the upland without in any ways interfering with the trap or the trap interfering with such ingress or egress and that he did not intend to extend it any farther than it was then.

COURT.—Any objection.

Mr. CHENEY.—Object for the same reason. I suppose he is just stating what he intends the offer—he asked the same question.

Mr. WINN.—No; I say I offer to prove this.

Mr. CHENEY.—You asked the question from the witness now. You made the offer of the same thing before?

Mr. WINN.—Yes; certainly.

Mr. CHENEY.—I object for the same reason: immaterial and not the best evidence.

COURT.—Yes; the objection may be sustained. The question in this case is not what the opinion of the defendant was at any time. The question here is, Is the right of access interfered with?

Mr. WINN.—I will take an exception, your Honor, to the ruling.

(Testimony of Fred Barker.)

COURT.—Yes, sir.

Q. (By Mr. WINN.) I don't know, Mr. Barker, did you help Mr. Hill make any of his measurements when he was out there on the 11th of March?

A. Yes.

Q. Well, I wish you would state—

A. Only some of them; only some of them.

Q. Just state to the Court, referring to this exhibit "D," what measurements you helped him to make and we will get over that quickly?

A. In the distance of the line as extended—between the condition [204] of the trap March the 29th and—

Q. How it was on March 11th of this year?

A. March 11th of this year.

Q. And what did you find that distance?

A. 261 feet.

Q. Yes; I know, but how is it represented on there, by a yellow line or dots?

A. By piling that were driven.

Q. Well, between what points?

A. Between east of the scattered piles.

Q. Well, give us the letters, Mr. Barker. You can see better than I can.

A. It is as dark for me as it is for you.

Q. Is it. Excuse me. I can't look down. My glasses are not very good to read with.

A. Between these Barron piles on the plat as marked "Barron's piles" and "Alexander's lead shore pile Mar. 11th, 1912."

Q. And what distance did you find that?



(Testimony of Fred Barker.)

A. 261 feet.

Q. Now, did you help Mr. Hill make any other measurements there?

A. I was present in the boat when he made the soundings.

Q. Oh, you were?      A. Yes; along the lead.

Q. Along the lead?      A. Along the lead.

Q. Along the lead that has been extended?

A. Been extended towards the shore.

Q. Do you—do you remember what those were?

Mr. CHENEY.—Suppose he can read them from the map.

A. Yes; I can read them from the map; various distances; varies from 18 feet to the last pile inshore a depth of 8 feet.

Q. (By Mr. WINN.) Was that correctly measured? [305]      A. It was a correct measurement.

Q. And it was as you say there indicated on this map?      A. It is.

Q. Now, did you help him make any other measurements?      A. I did not.

Q. That was the only measurements you helped him make? This sounding that he did in a small boat and which is indicated at various places on this exhibit you did not help to make that?

A. I was present in the boat. I did not help to make it.

Q. Oh, who was helping him to make it?

A. Captain Mason and the deck-hand was in the boat—two of the men from the crew at the cannery.

Q. Now, Mr. Barker, I believe you were questioned

(Testimony of Fred Barker.)

to some extent in this case on the motion to dissolve the preliminary order as to the condition of this beach in front of the Barron's piece of property?

A. Yes.

Q. Well, now, I wish you would describe that to the Court again, as your evidence in that case is not in this case.

A. It is simply high bluffs that extend as marked on the plat from corner No. 3—that should be corner No. 2, should it not?

Q. Yes; I think so.

A. That should be corner No. 2. These high bluffs extend east of it.

Q. Yes. A. And then immediately it is—

Q. Well, now wait. What commences at corner No. 2 and extends easterly along it for some distance, how is that?

A. That is comparatively level beach without bluffs on that [306] side of the survey.

Q. Yes. Now, what would be the most practicable and best place to wharf out there, Mr. Barker?

Mr. CHENEY.—We object. He is not qualified.

Q. (By Mr. WINN.) If a wharf should be built?

COURT.—He may answer if he knows.

A. I answered before. To intercept with that trap.

Q. (By Mr. WINN.) And it would be built out from which part of the shore line, considering this corner No. 1 and this corner No. 3, along what part of that shore line would you say is the most accessible way to reach deep water from this piece of ground?

(Testimony of Fred Barker.)

A. Why, you would have—this is the beach that we claim and you would intersect the trap with whatever line of wharf we drove there, because we cannot drive piles any other place.

Q. Now, here are two words “mean” and “high” on, or three words “tide,” now in referring to those three words on the shore line there where would you say was the best and most successful way of getting out from that piece of property?

A. As I testified before in the last hearing, I testified immediately in front; we want to make our line immediately in front of that cabin on account of the formation of the beach there.

Mr. WINN.—You may cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Barker, you say that in your opinion this would be the best place immediately in front of this cabin to build a wharf over this piece of tide land out so it would intersect the trap?

A. I say we want to reach that part of the beach.  
[307]

Q. He asked you—I understood you to say that you thought that was the best place to build a wharf, that was what Judge Winn asked you. Do you want to say that now?

A. I say we want to reach that portion with a wharf; that portion of the beach; this portion, as I testified before.

Q. Oh, I understand. You don't intend to give any opinion then, Mr. Barker, as to whether this

(Testimony of Fred Barker.)

would be the best part of the claim to build a wharf from here on this west end, what you call the sandy beach, or whether it would be better over here on the east end? You don't want to give any opinion on it?

A. I give the opinion: this is the portion of the beach we want to reach.

COURT.—The question is which would be the best place to build it; not where you want to build it.

A. I have answered. I don't want to change my testimony.

COURT.—Well, now answer this.

Q. Now, Mr. Barker, whether or not you mean that is the best place to build from or whether it is the place you want to build from. The question is not where you want to build from, but where the best place is? You can answer that.

A. I have answered to the best of my ability, Judge.

Q. I understood you answered when Judge Winn asked you what you would consider the best place to build here, you said directly in front of the cabin. Now, I thought you meant to convey the impression that you thought that was the best driving ground and the best place to build a wharf from out into the deep water. You don't—don't mean that, or do you mean that is the place you want to drive?

A. I don't know as I am fully competent to tell the best piece of ground on that beach. [308]

Q. (By Mr. CHENEY.) Then, you wouldn't want to offer an opinion on that point?

A. I cannot.

Q. You wouldn't want to say up on this east end

(Testimony of Fred Barker.)

was the best place to build a wharf?

A. No; I wouldn't say the east end for the simple reason the bluffs are there.

Q. You do want to give an opinion?

A. I am talking of the point on the beach we want to reach.

Q. I understand, but you have stated—I asked you if you wanted to give an opinion. You said you weren't competent. Then, I asked you if this isn't as good, if not better, over on the east end and you said it is?

A. I say to that as I have at first that the point on the beach we want to reach is immediately in front of the cabin.

Q. That is the point on the beach you want to reach is in front of the cabin?      A. Oh, yes.

Q. But you say you are not competent to testify whether this is the best place to build a wharf, best driving ground, or whether this end is the best?

A. I am not competent to say which is the best place to drive piles on that beach. I cannot say.

Q. You don't know but what this place you say you want to reach here is in fact the worst place on the whole survey to build a wharf?

A. I won't say that; I won't say.

Q. You know there is deeper water over on the east end. You do know that much about it?

A. I know there is deeper water over here.

Q. We are not talking about away down here. Don't you know as a matter of fact that the water gets deeper over to the east [309] end of the claim?



(Testimony of Fred Barker.)

A. I wasn't present when any soundings were made here.

Q. You were present with Mr. Hill out here?

A. No.

Q. Well, we will say along the lead line?

A. Yes.

Q. But you never sounded out here toward the east end of the claim?     A. No.

Q. No. You didn't sound out here?

A. No. I wasn't present.

Q. Now, Mr. Barker, let me ask you this: When you went down there on the 14th of March to see what Mr. Alexander was doing, you didn't say anything to him about this survey 804-B, did you, about what—I say, when you went down there to see Alexander about, when driving his trap, starting in to drive it, you didn't say anything about Mr. Barron's owning this survey?     A. No; I did not.

Q. And you didn't say anything to him about building a wharf out there, did you?     A. I did not.

Q. All you told him was that—that the company was going to build a fish-trap there, didn't you, and that they were going to drive all their traps this season?

A. I served the notice, which notice is on record.

Q. I asked you what you told him. Did you tell him anything?     A. Yes; told him so many matters.

Q. You told him that?

A. I told him we should protect our location.

Q. What kind of location? [310]

A. Trap location.

(Testimony of Fred Barker.)

Q. Trap location. And you did tell him that the company or Mr. Barron, I don't know which one you used, either the company or Mr. Barron, intended to drive all their trap locations this season?

A. I think the notice states that.

Q. The notice you served on him says that?

A. I think it does.

Q. That notice you served on him stated that the company intended to drive all their traps then?

A. The notice is of record. I won't state now word for word what it does contain.

Q. Well, you told him by word of mouth, that is, you told him orally, that the company intended to build a trap there, didn't you?

A. I think the notice—

Q. I am not asking about the notice now.

A. I don't know as I did. I don't know, Mr. Cheney, as I can not remember that. I distinctly remember giving Mr. Alexander that notice.

Q. Did you go up to Mr. Alexander like a deaf and dumb man would? A. No; I did not.

Q. Couldn't speak or hear anything and simply handed out the notice and go back?

A. No; I stayed down; talked about many matters.

Q. What did you talk about?

A. About his making a trap there.

Q. What did you tell him about the trap there?

A. I asked Mr. Alexander: "What are you going to do?" and he said: "If you leave me alone, I won't bother you at any [311] other place." The principal topic.

(Testimony of Fred Barker.)

Q. That is all the conversation you had?

A. Well, there was a great deal of it. That if you leave me alone here at that particular place, I won't bother you at any other place.

Q. I will ask you if at the last hearing you told him that the company or Mr. Barron were going to drive all the traps?

A. I think my notice was sufficient.

Q. I haven't asked you about that yet. I am asking you what you said to him orally. I don't care what you said to him by the notice. I am asking you what you said in the notice?

A. The notice is of record. I cannot remember the exact words that was in it.

COURT.—If he can't remember.

Mr. CHENEY.—I think that is the answer there.

Mr. WINN.—Wait a minute.

Mr. CHENEY.—He wants to complete his answer.

Mr. WINN.—Just wait a minute.

Mr. CHENEY.—Nothing before the Court.

Mr. WINN.—That notice is here. Now, when the witness says he don't remember anything else, I don't think should be prejudiced by not having the notice.

COURT.—I think that is a complete answer.

Mr. CHENEY.—Yes, but just as Judge Winn objected Mr. Barker was completing the answer there. He said that was the sense of it.

WITNESS.—May I answer this—explain?

COURT.—Certainly.

A. My impression was this: that I did not know

(Testimony of Fred Barker.)

what was going to take place in view of the right of Mr. Barron's location to this cove and the defendant was here on the ground. Now, [312] it is up to me to find out whether he is going any where else. I gave him the notice regarding that and then we had a conversation, just a free conversation, as it was. I didn't know who Mr. Alexander was. He didn't know me. We talked together and then I asked him the question, as I said before: "What are you going to do, Mr. Alexander, and where are you going next?" and he said, "I won't bother you any more if you leave me." Now, that is the part that is very fresh in my mind. I remember distinctly handing him the notice, because the notice was addressed to the Tee Harbor Packing Company, because the Tee Harbor Packing Company was the owner of the outfit, as I supposed.

Q. (By Mr. CHENEY.) Well, then, when you say that was the sense of it, what do you mean by that?

Mr. WINN.—I object to that.

COURT.—Have you the notice here?

Mr. CHENEY.—I am not talking about the notice.

WITNESS.—I would like to see the notice.

Q. (By Mr. CHENEY.) As to whether or not you answered that is the sense of it, that is Mr. Barron or the company was going to drive that trap location—what do you mean by that?

Mr. WINN.—He is going ahead and repeating a long conversation. Now, your Honor, I submit—

(Testimony of Fred Barker.)

Mr. CHENEY.—I am examining the witness.

COURT.—Just a moment, gentlemen. If you want to examine him about the condition of the paper, I think it ought to be submitted to him. If you want to ask him about anything he answered, that is another question, and I understood the witness to say he didn't remember.

Q. (By Mr. CHENEY.) Just ask you to answer the questions and not be talking about this notice all the time. What did you tell Mr. Alexander, if anything, in regard to the intention [313] of Mr. Barron to drive a trap on that location where you found Mr. Alexander with the pile-driver? What did you say; if you said anything?

Q. I have repeated all the conversation—I remember the greater part of it, and the notice was plain and legible. I handed Mr. Alexander that notice.

Q. Gave—just a moment—do you remember you told Alexander on that occasion Barron was going to put a trap there or not? A. I do not.

Q. Can't answer then. I understood you to say, Mr. Barker, that you are not competent to testify about the place of building a wharf? You don't want to offer an opinion on it—the best place to build a wharf there?

A. I don't want to offer the opinion as to which is the best driving ground on that beach.

Mr. CHENEY.—I think that is all, unless Mr. Jennings has some questions.

Mr. JENNINGS.—Just one or two questions.

Q. How long did you say you had been connected



(Testimony of Fred Barker.)

with the Thlinket Packing Company—how long have you been—how long had you been connected with the Thlinket Packing Company up to the time of the bringing of this suit?

A. This is the third season.

Q. This is the third season. And you was superintendent of the cannery at Funter Bay? A. I am.

Q. You were familiar with the plants of the Thlinket Packing Company, weren't you?

A. Not all of them; no.

Q. Well, Mr. Barron had talked to you about the trap sites? A. Somewhat.

Q. He had told you what he intended to do with them and whether [314] he intended to build, didn't he? A. Somewhat; has stated somewhat.

Q. And he told you whether he intended to build on this trap site? A. No; he did not.

Mr. WINN.—I object to it, if your Honor please, it is not proper. I don't think it is proper cross-examination. I never asked him about any conversation with Mr. Barron. I never asked him about the intention of the company. I simply asked him what he saw out there at the trap location and the conversation he had with Alexander and about Barron's buying the piece of property. Now, I don't believe that is proper cross-examination.

Mr. JENNINGS.—All right, I withdraw the question.

Q. You did say that you went down there, you saw some old location piles and was a notice on the piles, didn't you? A. I did.

(Testimony of Fred Barker.)

Q. What did the notice say?

A. The name of J. T. Barron on the notice, 1910; I think J. T. Barron was on the notice; I am sure of that.

Q. Well, what else?

A. I think it was the figures the year 1910.

Q. Well, that wasn't all. There was on the notice, "I hereby claim this as a fish-trap site"?

A. That I could not say.

Q. What did it say about a fish-trap site?

A. Didn't say a word about a fish-trap site.

Q. Didn't mention fish-trap site?

A. Didn't mention fish-trap site.

Q. Just three piles were there?

A. The name of J. T. Barron, no, there were three piles, I think, out there in the water. [315]

Q. Just the name of J. T. Barron and the date on it? A. That was all.

Q. Was the piles all together, like a dolphin, or were they spread out in a row?

A. They were scattered.

Q. Scattered in a row. In a row were they?

A. Probably no regularity.

Q. And this notice was on one of these piles?

A. Originally two notices.

Q. Two notices. Each one of them on a pile?

A. On different piles.

Q. Just said J. T. Barron and the date?

A. And the date; yes.

Q. Was it J. T. Barron or the Thlinket Packing Company? A. J. T. Barron.

(Testimony of P. H. Mason.)

Mr. JENNINGS.—That is all.

COURT.—Anything further with this witness, gentlemen?

Mr. WINN.—No, sir; that is all.

(Whereupon Court adjourned until ten o'clock A. M., March 19, 1912.) [316]

Ten o'clock A. M., March 19, 1912.

COURT.—Proceed with the trial, gentlemen.

**[Testimony of P. H. Mason, for Plaintiff.]**

P. H. MASON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Captain, give your name to the Reporter, will you? A. P. H. Mason.

Q. What is your business, Captain?

A. Master mariner.

Q. Have you followed the sea most of your life, Captain, in one capacity or another?

A. Yes, sir.

Q. You know Mr. Barron, do you? A. Yes, sir.

Q. And you are acquainted with the waters of Alaska? A. Yes, sir.

Q. Pretty well, are you not? A. Yes, sir.

Q. What experience have you had in navigating in the waters in Alaska—just previous to that, Captain, will you—the idea is I mean in addition to this you have had in your connection with the position you now have?

A. Well, I have been running up on the inside passage for the last twenty-five years, master of a vessel.

(Testimony of P. H. Mason.)

Q. And in the waters of Southeastern Alaska?

A. Southeastern Alaska.

Q. Yes, sir. You have been all over the waters of southeastern Alaska. You know where—you know where Funter Bay [317] and the Funter Bay cannery, of which the Thlinket Packing Company is the owner, are, don't you? A. Yes, sir.

Q. The cannery of which Mr. Barron is manager and the president of, the Thlinket— A. Yes, sir.

Q. — Packing Company. What are you following now, Captain?

A. I am master of the "Anna Barron."

Q. Master of the "Anna Barron." What is the "Anna Barron"? A. She is a steamer.

Q. And what is she doing? A. Towing.

Q. What business engaged in?

A. Fish business, towing trap piles, lighters, anything comes to hand.

Q. Is she one of the cannery tenders of the Thlinket Packing Company, the company of which Mr. Barron is manager and president? A. Yes, sir.

Q. How long have you been on the "Anna Barron," Captain? A. This is my third season.

Q. Third season? A. Yes.

Q. You have been master of her three seasons?

A. This will be. I have been master of her two seasons. This will make the third season.

Q. This will make the third season. Just tell the Court what business the "Anna Barron" has been engaged in generally since you have been master of her.

(Testimony of P. H. Mason.)

A. Towing fish, towing lighters, towing pile-driver and towing piles. [318]

Q. Then she has been, as I understand, in the general towing business for this cannery at Funter Bay?

A. Yes, sir.

Q. For which Mr. Barron is manager and president. You don't carry any fish on board of her at all? She isn't used for that purpose? A. No, sir.

Q. When you say towing lighters, what do you mean Captain?

A. Towing fish scows, fish lighters.

Q. Towing both empty and filled? A. Yes, sir.

Q. And you said something about towing logs or piles? A. Towing piles.

Q. Towing piles? A. Yes, sir.

Q. What do you tow piles for and what have you been towing piles for this past three years?

A. For trap piles.

Q. For the Funter Bay cannery? A. Yes, sir.

Q. Just put this remark in there, Mr. Reporter, and it will save some of my questions: When I refer to the Funter Bay cannery I refer to the cannery of which Mr. Barron is the president and manager, the cannery being owned by the Thlinket Packing Company. Now, Captain, during these three years have you become fairly well acquainted with the waters for some miles in and about Funter Bay?

A. Yes, sir.

Q. Now, Captain, I refer you to Plaintiff's Exhibit "B" in this case and I wish you would go over to this exhibit and take [319] this ruler and point out to



(Testimony of P. H. Mason.)

the Court the route that you take in towing piles each season for this—this canning company at Funter Bay.

Mr. JENNINGS.—We object to this line of testimony as irrelevant and immaterial.

COURT.—He may answer. Objection overruled.

A. Well, that depends where we are towing from.

Q. (By Mr. WINN.) Well, where have you been, in reference to Funter Bay, now where have you been towing the piles, north or south, east or west?

A. From the south.

Q. From the south? A. Yes.

Q. Well, you said a while ago that it depended upon where you were towing from—for how many places south of Funter Bay has your towing been confined to? A. Kelp Bay and Peril Straits.

Q. Well, now, in leaving Funter Bay, what body of water do you go down first as you leave Funter Bay?

A. Come out of Funter Bay and come right straight down in a southeast direction.

Q. In Chatham Straits?

A. In Chatham Straits.

Q. Yes. Toward where the fishing ground of—I withdraw that question, Mr. Stenographer—you know where this survey 804 of Mr. Barron's is, do you not, Captain? A. Yes, sir.

Q. With reference to that survey, about how far off the shore is your usual passage in going to and from the cannery with your tows of piles?

A. About—usually about half a mile. [320]

Q. Yes. Now, have you passed up and down this

(Testimony of P. H. Mason.)

shore alongside of the survey off and on for these past three years?     A. Yes, sir; a number of times.

Q. Now, I wish you would just describe the land and ground as it is out in front of this survey 804, whether or not there is a cove or a little harbor. Describe it to the Court in your own way, Captain.

A. Well, this cove in here for northerly winds and northwest winds is a very good harbor; coming to the northward it is an excellent harbor.

Q. Well, it is—where is that with reference to this survey 804?     A. That is right in front.

Q. Right in front of it?

A. Yes, sir; of the survey.

Q. I will ask you, Captain, if in going back and forth there for the last three years you have taken notice of this place going up and down, that is, this little cove that is in front of the land or survey 804?

A. Yes, sir.

Q. Now, I will ask you if during that time you have had occasion to be in there for any purpose?

A. I have been in there twice for a harbor towing piles from Kelp Bay.

Q. (By the COURT.) From what bay, Captain?

A. Kelp Bay.

Q. (By Mr. WINN.) Kelp Bay is on to the southward of Funter Bay cannery?

A. About fifty or sixty miles from the cannery; about sixty-five miles from Funter Bay.

Q. Well, why didn't you stop in Hawk Inlet when you was seeking [321] shelter?

A. This is more accessible and I would be that much nearer to the cannery. This is perfect safety.

(Testimony of P. H. Mason.)

Q. Now, I will ask you, Captain, if you, when there is a northerly wind blowing, whether or not—I will withdraw that question—when there is a northerly wind and you are going down Chatham Straits from Funter Bay on this route for piles, I will ask you if you have observed whether there is any check in the velocity of the wind here along this coast, when there is a stiff northerly wind blowing; that is, is it blowing the same up and down the coast of Admiralty Island on the side on which this survey is on or is there a difference in the case of a northerly wind? A. No, sir; it is different.

Q. Well, explain to the Court where it is different and what makes the difference.

A. Well, the tendency of the land, I think, has—makes one of the things; and the moment you get within a half a mile of this bluff the wind ceases, that is, speaking with a strong wind and when you get opposite this bluff in here, practically speaking, there is no wind to speak of at all.

Q. What is your usual route for your towing of piles when you are leaving Funter Bay as you come down the coast of Admiralty Island towards this survey? About how far do you usually go down there before you turn off in one direction or the other; that is, do you go on down the coast as far as Hawk Inlet? A. Oh, no, sir.

Q. When towing piles before turning off to that other ground? A. Towing from Funter Bay?

Q. Towing to Funter Bay. [322]

A. Towing to Funter Bay?

(Testimony of P. H. Mason.)

Q. Yes; towing to Funter Bay.

A. Well, I have an idea of my own. I come up along Chicagoff Island until I get pretty near to Cape Augustine, then I strike right across and try to avoid Cape Marsden.

Q. Where is Cape Marsden?

A. Cape Marsden is further down on this same Admiralty Island.

Q. Is it down south of Hawk Inlet?

A. Yes, sir; and—

Q. I see.

A. —and then I come up straight; avoid Hawk Inlet and come in this bay here. If the wind is to the north, if, practically speaking, little wind, little sea, we can come up until I happen to come out here.

Q. Until you happen to come out here—come until you happen to come out where this survey is?

A. Yes.

Q. And from there south with a northerly wind it is somewhat sheltered by this formation of the island there? A. It is.

Q. Yes, sir. Now, Captain, you can sit down. I believe that is all at present on that score. Captain, have you been into this little harbor, as you call it, in front of this survey 804 since Alexander built his trap there? A. Yes, sir.

Q. Was a trap built there when you went in with these tows of logs? A. No, sir.

Q. When did you first see this structure that Alexander has erected out in front of this survey 804? A. That was in March, 1911. [323]

(Testimony of P. H. Mason.)

Q. March, 1911. What time, Captain?

A. The latter part of March, the 28th or 29th.

Q. What was the occasion of your trip out there, then?

A. Well, to make a—to take a general survey of the place and see the situation there—what Mr. Alexander was doing.

Q. Who accompanied you on that trip, Captain. Who was with you on the boat, do you remember? Was Mr. Barron, Mr. Hill or Mr. Dudley and Mr. Barker?

A. No, sir; I think Mr. Barker was, but not Mr. Hill. Mr. Barron wasn't there.

Q. You was out there on one of the trips Mr. Barker speaks of? A. Yes, sir.

Q. Do you remember the time the hearing was had in this court on the motion to dissolve the temporary restraining order? A. Yes, sir.

Q. You was a witness here then, I believe?

A. Yes, sir.

Q. Now, when was you out to these grounds in front of the survey with reference to the hearing on that motion?

A. I think I was—after the hearing was over. I was there about between the 7th or 8th or 9th of April, somewhere along there.

Q. And before the hearing—you was there just before the hearing also? A. Yes, sir.

Q. Now, Captain, there is a paper here or map of the land, that has been offered in evidence in this case and marked exhibit "D," which is the map or plat



(Testimony of P. H. Mason.)

which Mr. Hill made. I will ask you, by acquaintance with the grounds out there and the land in front of Mr. Barron's survey, if this map fairly portrays the matters as you have observed them out there in [324] regard to the fish-trap, the contour of the shore line and these reefs and the observations that appear on there particularly?

A. Yes, sir; I think they do, in fact, I know it does.

Q. Yes, sir. Now, Captain, at the time that—that the—at the time the hearing was had on the motion to dissolve the temporary restraining order how much of that trap was in at that time? Can you go to this exhibit and state to the Court how much was in at that time?

A. Well, I counted the piles myself.

Q. Yes, sir.

A. Well, I counted them over three times and I made it different; one was 39; one was 41; and one 42; so I calculated there was about 40 piles.

Q. Yes. Now, if you will come over to this exhibit, which I have just referred to, which is D, and state to the Court about what portion of the trap—I don't mean as to whether or not that the heart and filler (spiller), and so forth, and so on, the spiller and so forth in the same condition as they were in this map, but I mean as to the length, and so forth, about. What part of the trap was completed at the time the hearing was had upon that motion?

A. Well, taking this here, this is D, there was that part was finished to the westward.

(Testimony of P. H. Mason.)

Q. That is the part marked "Barron's piles"; it was completed out that far?     A. Yes, sir.

Q. And then went down to the heart?

A. This wasn't complete.

Q. Yes, but the lead down to the heart was completed?     A. Yes, sir.

Q. At that time—but the heart and the other part of it— [325] big part of the trap was not completed upon that hearing?     A. No, sir.

Q. Now, Mr. Mason—Captain, you can just take your seat. I will ask you if you was in the courtroom at the time Alexander testified.     A. I was.

Q. On the hearing on that motion. I will ask you as to whether or not you heard him state at that time that his trap was complete all with the exception of putting in eight piles which were to go in somewhere about the heart and the spillers of the trap?

Mr. CHENEY.—Object to that, if the Court please, on the same ground, that it is immaterial and not competent for this witness to tell at this time what he heard Mr. Alexander state.

COURT.—I think the objection should be sustained.

Mr. WINN.—I will take an exception, if your Honor please. I wish to make the same showing with this witness—that we offer to show by him that Mr. Alexander did testify then that his trap was completed there with the exception of eight piles that was to be put in along the heart and spiller and it wouldn't be—would not be constructed so to extend

(Testimony of P. H. Mason.)

any farther toward the shore on either side or end of the trap.

COURT.—The offer objected to.

Mr. CHENEY.—Object to the offer for the same reason and the further reason it is not the best evidence. The evidence is the best record.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception, your Honor.

Q. Now, I will ask you also another question, Captain, while [326] along that line, as to whether or not you heard Mr. Alexander—no, withdraw that question—I will ask you if it isn't a fact that Mr. Alexander also testified upon that hearing that he did not expect to drive any farther out towards the shore on the lead of his trap as it was then constructed?

Mr. CHENEY.—Object to that for the same reason as to the other last question.

COURT.—Objection sustained.

Mr. WINN.—Yes, sir; I will take an exception. I will make the same offer to show that he did testify that he wasn't going to drive any more on his lead and his trap in every respect was complete and he didn't expect to construct his trap so that any piles in it would be any closer to the shore than they were at that time.

Mr. CHENEY.—Same objection.

COURT.—Same ruling and for the reason that the testimony is immaterial at this time.

Mr. WINN.—I will take an exception.

Q. I will ask you if you did not hear Mr. Alex-

(Testimony of P. H. Mason.)

ander also substantially testify upon that trial that the reason that his trap at that time did not interfere with free access or ingress and egress to and from this upland of Barron's was that he hadn't constructed his lead any farther out towards the shore and that the—and that the steamers would have plenty of room to come in there and go back of his trap and any part of the shore, by reason of not constructing any longer lead than he had at that time.

Mr. CHENEY.—Object to that for the same reason. It is immaterial.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception I make the same offer [327] at this time, your Honor, to show that Alexander did testify that was the reason why he said he wouldn't interfere with our free ingress and egress to and from our upland out to deep water was that his trap, as then constructed, was out in navigable water and he didn't expect to run his lead in any further toward the shore.

Mr. CHENEY.—I don't agree with counsel that is the testimony.

Mr. BURTON.—It is one of the allegations in the complaint.

Mr. CHENEY.—For certain sea boats. We say that the boats can go through there.

Mr. WINN.—I offer this testimony—don't understand I am offering for any particular purpose. I am offering for all purposes, that is it is material under our supplemental pleadings, and then it is material to show to the Court even from the conver-

(Testimony of P. H. Mason.)

sation of the defendant in this case that the defendant—appears now from the evidence the way he has constructed the trap that absolutely it does interfere with our free ingress or egress. I don't offer it for any specific purpose. It is for all the purposes in the case on the supplemental pleadings and as giving the view of the defendant in the case and showing the situation. I didn't want to confine it to any specific purpose at all, and I ask that your Honor's ruling is made on all the purposes, and not as going to any specific purpose.

COURT.—The evidence is excluded for the reason at this time that in the trial of this case the plaintiff must show that there is an actual interference with his access. Any admissions that the defendant may have made with reference to that cannot be material. They may become material if the witness—if the defendant takes the stand and become [328] a witness and offers his opinion as to whether it interferes, but at this time it cannot be a part of the plaintiff's case in chief.

Mr. WINN.—I thought your Honor was ruling on it on the general principle. I didn't want Mr. Cheney's remark—but I will state on account of the remarks he made that I wasn't offering it for any specific purpose.

Q. Now, Captain, I will ask you if after you visited this location or at the time you visited this location in April, after the hearing that was had on the motion for the dissolution of the temporary restraining order, as to whether or not you found the trap in the



(Testimony of P. H. Mason.)

same condition as it was in at the time of the hearing, or had it been changed, added to or taken from, or anything, in April?

Mr. JENNINGS.—Object to that, irrelevant and immaterial whether been changed or not.

COURT.—Objection overruled.

Mr. WINN.—You can answer that.

COURT.—Yes, sir.

Q. (By Mr. WINN.) You can answer.

A. The trap had been changed.

Q. Well, will you go over to this exhibit “D” of the plaintiff and just explain to the Court what changes had been made in the trap after you went out—when you went out there in April?

A. This additional line was, yes, sir; then also a line extended further and this was finished, part of the spiller as he calls it here.

Q. You see the piles that Mr. Hill has indicated on here in black? A. Yes.

Q. Extending from those called “Barron’s piles” up to the [329] words “Alexander’s lead shore pile” and so forth, is that the—are those the piles between there you meant had been driven?

A. Yes, sir.

Q. Between those two words I have indicated. Did you—who was with you at that time, Captain?

A. Well, I don’t know—let’s see—Mr. Barker was with me once there when I was out there.

Q. That was in April? A. That was in April.

Q. Well then, you was there later on in the summer?

(Testimony of P. H. Mason.)

A. Well, I was there two or three times in the summer.

Q. Two or three times in the summer?      A. Yes.

Q. Now, when you was there later on in the summer had Alexander strung his web over his trap and was he fishing it?      A. Yes, sir.

Q. Now, I will ask you to state to the Court in what manner he had his web hung with reference to the space between the last pile in the lead nearest the shore and the shore?

A. He had his line or wire fixed to this last pile, then he had a shear on the beach. This wire was stretched from this pile over these shears and made fast up here to a dolphin of some description. I didn't go to see what it was, and the web was attached to that, hung down to the water.

Q. Then he had one contrivance on the shore that he had it attached to and one on the upland that he had this cable attached to?      A. Yes, sir.

Q. And on this cable he had hung what?

A. A web.

Q. Now, how far, Captain, as you remember did this web extend [330] from the last pile in the lead towards the shore?      A. Toward this shear?

Q. Yes, sir.      A. Toward this shear here?

Q. Yes, sir.

A. Well, at low water the web was hanging on the bottom. It was dry.

Q. Now, Captain, were you out there when Lloyd Hill went out and made soundings?

A. I was this last time.

(Testimony of P. H. Mason.)

Q. Yes, sir; you was this last time. Did you keep track of those soundings?

A. I was handling the lead, myself.

Q. You were handling the lead. Will you explain to the Court where you sounded, on this map?

A. We sounded from here to here (indicating) and then inshore as far as we could get water.

Q. Well, you mean?

A. From this mark; from this location here.

Q. Piles—"Barron's piles"?

A. Yes, sir, in to that end of his piles.

Q. End of the lead?

A. And then as far as the water extended, as far as the boat would go, as far as it would float.

Q. So far as what boat? You mean the rowboat?

A. The rowboat.

Q. Well, now, Mr. Hill has indicated on this map and placed those soundings. Are those soundings here, as indicated by Mr. Hill, as you found them by the measurements? A. Yes, sir.

Q. You didn't help him make these other soundings out there? [331] A. Part of them.

Q. Oh, did you?

A. And this one here, and then afterwards I made these the next day following.

Q. The next day following? A. Yes, sir.

Q. Then you did help him make some soundings from the end of the trap out towards the bare rock?

A. Nearest pile to that place.

Q. Yes, nearest pile to that place. And the sound-

(Testimony of P. H. Mason.)

ings, as indicated upon this exhibit "D," are they as you found them on the ground?     A. Yes.

Q. And in the water as you measured them?

A. Yes.

Q. Now, Captain, I will ask you if you have ever had any experience in leading in there—in making soundings on the right-hand side of the lead of the trap as you come in to Barron's claim 804?

A. I have paid particular attention to the subject to out 600—from 500 to 600 yards north from this trap to the eastward.

Q. Yes.

A. And I sounded the bottom and I know, if I have any judgment, that it was—that the lead would strike, it was rocky and the nearer I approached the trap from the east the less rocks I had to contend with.

Q. Well, what would you say about the—about the ground that is between this lead of the trap and the prolongation of the easterly end line of Barron's claim as to whether or not that is as good for driving piles and anchoring as the ground is between that lead and this peninsula? [332]

A. This lead here is—this bottom here?

Q. No, the bottom here. You mean on the right-hand side?

A. To the right of the trap, to the eastward of the trap, I am speaking now all this time.

Q. Yes.

A. This bottom to the east of the trap, so far as my judgment is concerned and with the indication of the

(Testimony of P. H. Mason.)

lead is, provided you are to anchor or to drive piles, this I don't think you can drive in this ground.

Q. Why, Captain?

A. Because the bottom there is rocky and there is a shelf of rocks making off, right off here.

Q. Making off from the upland?

A. Making off from the upland in a westward direction at right angles to this trap.

Q. Now, at certain times you have gone in there to anchor and find shelter. Where is the place you have gone in to anchor with reference to Barron's claim and the lead of the trap? Is it on the right or left of the lead of the trap as you come in?

A. I think, as near as I can judge, anchored about here a few fathoms from this lead.

Q. A few what?      A. A few fathoms.

Q. Fathoms?

A. To the westward, northwestward of this line—this lead.

Q. Near the mark called "Barron's piles"?

A. Yes, sir.

Q. Now, in reaching this claim of Barron's if you were going in there with a boat, taking in anything, lumber, timber, and [333] so forth, and of course you couldn't get in on the shore with your steamer, where is the best, and in your judgment the only, accessible way of getting to that upland from the deep water, Captain?

A. This is it, if that trap wasn't there?

Q. Yes, sir.      A. Anchor here (indicating).

Q. And you would anchor—you would anchor at a



(Testimony of P. H. Mason.)

point between what is called the bare rock and the row of Barron's piles?     A. Yes, sir.

Q. On the left of it—of the lead as you go into the bay?     A. Yes, sir.

Q. Now, I will ask you if it would be possible to go in there and anchor in order to reach this upland of Barron's with this trap in there constructed as it is constructed?     A. I say no, it is not possible.

Q. Well, now suppose that you were going in there to reach this place with a tow of logs for any purpose, building a wharf or building a fish-trap, with a tow of lumber or with a tow of fish, as you have been in the habit to tow, I will ask you whether or not that you can get any where, anchorage, in front of Barron's upland there with that trap constructed as it it?     A. No, sir.

Q. Explain to the Court why not, Captain?

A. You haven't the room between here to drop your anchor, the chain there. You would swing either against the trap or else would be too close to the rock and you would have to move at low water any how.

Q. In anchoring a boat the size of the "Anna Barron" or—I will withdraw that question—Are you acquainted with the little [334] gasoline boat "Kodat"?     A. Yes, sir.

Q. Have you ever been on her?

A. Not to run her. I have been on her several times, but not to run her.

Q. Well, then we will confine ourselves to the "Anna Barron." Coming in this harbor, if you were

(Testimony of P. H. Mason.)

going in there for any purpose to reach the upland, or any where else to reach the upland of Barron's and wanted to have—had a load on your boat—we will cut out the scow business or towing—I will ask you if just going in there under those circumstances with a load on the boat and you wanted to reach the upland, as to whether or not, Captain, you would consider that you could get in there with any degree of safety with that trap in there without injuring the trap?    A. I say no.

Mr. JENNINGS.—Without what, Judge?

Mr. WINN.—Without injuring the trap.

Q. Captain, now, what—I withdraw that question—I will ask you in anchoring a ship, have the steamboat men, masters, got a sort of a rule that they go by as to the amount of chain they should throw out or throw out with the anchor?

A. Yes, yes, sir; that is depends on the condition of the weather and everything like that.

Q. Depends on the condition of the weather. Of course, you take that into consideration when you say you couldn't go in this place and anchor with that trap in there?    A. Yes, sir.

Mr. JENNINGS.—He didn't say that.

Mr. WINN.—He said, yes, sir.

Mr. JENNINGS.—He didn't say he couldn't go in there and anchor [335] with this trap in there.

WITNESS.—I did. I stated it.

Q. (By Mr. JENNINGS.) You said you couldn't go in there and anchor without injuring the trap?

A. No, sir; I did not.

(Testimony of P. H. Mason.)

Mr. JENNINGS.—I appeal to the record.

Q. (By Mr. WINN.) Of course, Captain, if you can run through the trap—if you run through the trap and tear it down, could get in there and anchor then, couldn't you? A. Yes, sir.

Mr. JENNINGS.—You didn't say interfere with your anchoring. You say interfere with the trap. We are not bringing injunction against Mr. Barron. He is bringing an injunction against us.

Q. (By Mr. WINN.) Would it be safe, Captain, for your steamers to lambast against that trap there, in order to anchor with the trap in there the way it is now? A. No, sir.

Mr. WINN.—You are technical about this.

Mr. JENNINGS.—No; I am not technical. You are trying this case on the assumption we are bringing the injunction against you and not you against us.

Q. (By Mr. WINN.) Now, Captain, you stated that you have sounded and tested the bottom on the right-hand side of the trap as you go in. I will ask you to state to the Court as to whether or not you would consider the space between the prolongation of the east end line of Barron's claim—between that line and the lead of the trap, if you would consider that this would be a safe place to go and enter to reach the upland of Barron's for anchoring purposes or any other purpose? [336] A. Would not.

Q. How—how does the water,—Captain,—well, I withdraw that question— How is this part on the right-hand side of the trap with reference to being

(Testimony of P. H. Mason.)

exposed to the waters of Chatham Straits down the channel?     A. The waters?

Q. Yes, sir. It is all water, isn't it?

A. Yes, sir; this is all water, the whole thing. The further you get this way the more you are exposed to that wind no matter whether from the northward, west or anywhere else.

Q. The further you get to the east?

A. Eastward of the trap the more you are exposed to Chatham Straits.

Q. Now, Captain, from your knowledge of that water, I will ask you to state to the Court where the natural, reasonable outlet to deep water from this upland of Barron's is—over what part of that water in front of it, in reference to where the lead of the trap is?     A. Well, is this one corner here?

Q. This is—no, sir.     A. This up here?

Q. Yes, sir.

A. Well, this is one corner (indicating).

Q. No. Corner 1 of Barron's claim is this little square up here.     A. That is right in there?

Q. Yes, sir. Now, I am asking in front of that property of Barron's—I don't care whether you consider in front of the property clear out to the peninsula or not, but I will ask you where is, knowing that harbor as you do and from the soundings, and so forth, where is the natural route or [337] access of ingress or egress to Barron's property?

A. Right here (indicating).

Q. That is between the—between the lead line of Alexander's trap, as it is given, and the prolongation

(Testimony of P. H. Mason.)

of the westerly side line of Barron's homestead?

A. Yes, sir.

Q. Well, about midway between there?

A. Yes, sir.

Mr. CHENEY.—Well, that is granting a good deal for the attorney to testify to things that the witness has never said. It has been that way all the time. We haven't objected, but Judge Winn is testifying right along.

COURT.—No, the counsel is endeavoring to describe on the map where the witness points out, Mr. Cheney.

Mr. CHENEY.—But the witness is capable of telling that himself.

COURT.—That may be true. Can't harm anything.

Q. (By Mr. WINN.) I will ask you, Captain, as to whether or not this trap then as it is now constructed would obstruct the ingress or egress in to and from this upland over this route that you have just described?

A. This trap, as it stands—the situation is now—absolutely obstructs the whole harbor.

Q. And when you say the whole harbor, do you mean the whole of the frontage of Barron's claim?

A. The whole frontage of Barron's claim. The frontage of this bare rock here, as you have termed it.

Q. You can be seated now, Captain. I understood you, Captain, did you, if not, or do you or would you say you had sounded on the right-hand side of the lead of the trap as you go into this upland of Barron's?



(Testimony of P. H. Mason.)

You have sounded there?

A. I have sounded to the eastward of the trap.  
[338]

Q. Yes, sir.

A. Yes, sir; taking Mr. Alexander's cabin and making a direct line to the westward from that.

Q. Yes.

A. Which would give you at the end of that north end of his trap some thousand feet, I guess.

Q. Now, where is Alexander's cabin with reference to what is indicated on this map here, U. S. Survey Number 804?

A. Mr. Alexander's cabin is away off here.

Q. Well, let's put something there.

A. Right there (indicating).

Q. Let's put the letter "A" there.

A. Yes.

Q. Then you say Alexander's cabin then would be approximately where I have marked the big letter "A" with a pencil?     A. Yes, sir.

Q. Now, you have sounded from, taking that as one point and another point down here?

A. I come off, right straight westerly, angling that way, right down until I got to this place, right here.

Q. Across toward the lead?

A. Across toward the lead.

Q. Now, I understand your testimony, so as to make it plain, you have sounded right straight down from the letter "A" until you reached a point pretty nearly opposite the heart or spiller?

Mr. CHENEY.—He didn't say heart or spiller.

(Testimony of P. H. Mason.)

Said the opening, the opening of this line, where it opens on Chatham Straits.

Q. (By Mr. WINN.) Well that is pretty near the heart or spiller. If you will just let me alone I will get it into the record [339] as near I can. You meant you have made the soundings where that letter "A" is and down out towards the heart or spiller?

A. Yes, sir.

Q. And a little beyond the heart and spiller into deep water? A. Yes, sir.

Q. Now, Captain, from these soundings you have made and I believe you testified a while ago as to what you ascertained, if you didn't—

A. Yes, sir.

Q. —I wish you would. A. I did.

Q. You stated what you ascertained from that?

A. Yes.

Mr. BURTON.—He didn't testify as to the depth of the water at the end of the lead.

Mr. WINN.—Yes, he did.

Q. You testified a while ago that you helped to make these soundings? A. These soundings.

Q. These soundings along the lead?

A. Yes, sir.

Q. And that the figures put on the map or plat there are correct? A. Yes, sir.

Q. Yes. Now, you helped to make these soundings. Just take your seat, Captain. You helped to make these soundings when Lloyd Hill was out there on the 11th of March? A. Yes, sir.

Q. Have you a tide-book here? I will ask you,

(Testimony of P. H. Mason.)

Captain, on the 11th of March as to how the tides run then, that is, as to whether they were extreme low, high or medium? [340]

A. No, sir; they were small tides.

Q. Small tides? A. Yes, sir.

Q. What do you mean by small tides?

A. Small tides is small run out and a small flood; that is, less than medium; was extremely small, if I am correct.

Q. Now, I will ask you, Captain, if you will take the tide-tables, which is an official pamphlet of the Department of Commerce and Labor and which is used by navigating men, and to estimate approximately from the measurements which you took on the 11th day of March, finding, as you say, the water eight feet deep at a certain time at the place where this last pile in the lead is, nearest to the shore line, and tell approximately how far then it would be from that pile at low tide on the 11th of March to the shore line? A. When we took these soundings?

Q. Yes, sir.

A. It was within one hour of low water then, but you take the mean long run out and at the end of that pile there wouldn't be two feet of water.

Q. That is the mean run out? A. Yes, sir.

Q. There wouldn't be two feet of water. Now, in the extreme low tides how would that pile be?

A. Well, that is what I meant when I said at low water.

Q. Yes; at mean low water? A. Yes, sir.

Q. Now, suppose—how do you think it would be in

(Testimony of P. H. Mason.)

the June tides, and so forth, when extreme high or extreme low?

A. At that time there wouldn't be over two feet of water.

Q. What do you mean by the mean low—you have to average it [341] up and get it for the year around? A. Yes, sir.

Mr. WINN.—That is all at present, your Honor.

COURT.—Cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Captain, how many years did you say you had been employed by Mr. Barron? A. This is the third year, sir.

Q. You have been—you have been running the “Anna Barron,” then, for about three years, have you? A. Will be when I finish this season.

Q. And during all that time you have only used this harbor twice to run in with a tow of logs?

A. That is all I have.

Q. And those logs came from Kelp Bay?

A. Yes, sir.

Q. You have never gone in there with any logs from Fresh Water Bay?

A. Never towed any from Fresh Water Bay before this year.

Q. Not before this year? A. No, sir.

Q. Haven't towed any this spring? A. Yes, sir.

Q. You have?

A. I haven't, but the “Buster” has.

Q. How many booms has the “Buster” brought up? A. One.

(Testimony of P. H. Mason.)

Q. Just one, and that is the only one towed from Fresh Water Bay at all? [342]

A. To my knowledge.

Q. To your knowledge? A. Yes.

Q. Now, do you remember that boom that you did bring in? What boat did you say brought that in?

A. The "Buster."

Q. The "Buster." Do you know whether or not they had to run in there for shelter that day?

A. They was into Hawk Inlet.

Q. They was into Hawk Inlet?

A. Or just outside of Hawk Inlet. Didn't go up to the cannery, but just went inside. He didn't say—the captain says, "Well, I had to go into Hawk Inlet and lay over night," and I didn't ask him any more or any more about it.

Q. Well, so far as you know, Captain, then only on two occasions in the last two years and a half, we will say, have the boats, that is the tow of logs, gone into this little harbor there, this harbor we are speaking of?

A. That is only twice I have been in there, but remember—wait a minute—remember I have only made six trips down to Kelp Bay and the six trips I was in twice.

Q. That is in with a tow of logs? A. Yes, sir.

Q. Or with a— A. With trap piles, not logs.

Q. What? A. With trap piles, not logs.

Q. Well, trap piles. The other times you just went right on up the Straits and went into Funter Bay and went right in? A. I did.



(Testimony of P. H. Mason.)

Q. Now, you said, Captain, in answer to Judge Winn's question, you said that if the "Anna Barron" went in there between the [343] point called bare rock and the trap and anchored that it wouldn't be safe for the boat, that is, when anchored midway between that lead and that bare rock, wouldn't be a safe place to anchor the boat? A. It would not.

Q. And then you said you would have to move at low water anyhow? A. Yes, sir.

Q. So, then by that, Captain, you mean when low water came you would have to move further out?

A. Move further out.

Q. Then the trap wouldn't cause you to move out? You would have to move on account of low water?

A. If the trap wasn't there wouldn't anchor there in the first place.

Q. You wouldn't anchor there in the first place?

A. Not where you would now.

Q. I see. If you did anchor there you would have to move out. Now, if you anchored there at the same place, Captain, as you mentioned in answer to Judge Winn's question, and no trap there at all, you would have to move out at low water? The trap wouldn't have anything to do with it?

A. Well, I wouldn't anchor.

Q. Well, if you did anchor and the trap wasn't there when you went in there at the same place you have mentioned in answer to Judge Winn's question?

A. I am answering this now. I am not answering Judge Winn.

(Testimony of P. H. Mason.)

Q. I understand, but if you did go in there, Captain, and anchored and had to move out on account of low water, wouldn't make any difference whether a trap was to the westward or not. You will move away on account of the low water? That is what I am trying to get at.

A. Certainly the trap would make a difference.

[344]

Q. Wouldn't make any difference about your moving on account of—moving on account of low water?

A. Have to do that, certainly for anything.

Q. Certainly, have to move on account of low water? A. Yes.

Q. If you ran the "Anna Barron" up here any time before this trap was ever built, up in here between the lead of Alexander's and this point called bare rock, and anchored and it comes low water, you would have to move out, move your big boat out, wouldn't you?

A. If I was too near there, wasn't water enough to swing clear.

Q. Yes. You testified before in the trial of this case that you didn't consider it safe for the "Anna Barron" to go through between the trap and the point? A. I know it.

Q. Well, now in answer to Judge Winn's question a few moments ago, what part of this trap did you intend to tell the Court had been put on there since the trial of this case last year? Do you mean this forty feet that is in this square here? A. Yes, sir.

Q. That is what you mean. You don't mean this

(Testimony of P. H. Mason.)

part has been put on out in here in the pot of the trap? I want to find out what you meant when you testified.

A. This is all under water he called the heart.

Q. Yes, that is there.

A. This piece was attached.

Q. And this was there, wasn't it?

A. This was partly finished, but not completed.

Q. But this in the center was, wasn't it? Now, and this pile of the lead nearest to this point as the trap existed last year, when you testified, Captain?

[345] A. Well, this would be.

Q. Right here? A. Yes.

Q. Between the additional space that is from here there—from there over to here, whatever that measurement is? A. Yes.

Q. There would be that many feet, whatever it is, from the pot over to here, would be the difference between last year and this year? A. Yes.

Q. Do you know what distance that is?

A. Not exactly.

Q. What do you think? A. About fifty feet.

Q. That is you are making that your estimate?

A. Yes, approximately.

Q. Now, Captain, if you were coming up Chatham Straits with a tow of logs or with a tow of fish and there was a southeaster blowing good and hard, or a south wind blowing or a southwest wind blowing or east or west wind blowing, that is a good hard one—

A. Yes.

Q. —you wouldn't go into that harbor?

(Testimony of P. H. Mason.)

A. For a southeaster I would.

Q. You would for a southeaster? A. Yes.

Q. Did you ever go in there when a southeaster was blowing? A. Yes, sir.

Q. When? A. Last summer. [346]

Q. Last summer?

A. Yes. Nothing special, just to go in to see—wanted to see what was in there.

Q. You went in there and found it a pretty safe harbor? A. Safe enough for the “Anna Barron.”

Q. This is this past summer? A. Yes, sir.

Q. Well, now, Captain, I want to ask you something about this business over here. You didn’t testify anything about this last year, about measuring that ground over here? A. I hadn’t measured it.

Q. You hadn’t measured it? A. No, sir.

Q. Well, now, if you will come down here, Captain. I understand you to say that this expresses where Alexander’s cabin was? A. Yes, sir.

Q. About six or seven hundred feet east of this claim? A. More than that.

Q. More than that? A. Yes.

Q. More than six or seven hundred feet. Now, will you place it here? I understand this line of the lead down here is south. A. No, west.

Q. You call that west?

A. Well, that is facing the upland, that would be west.

Q. Started out from the upland leading into Chatham Straits? A. Yes.

Q. And then you made soundings out in here (in-

(Testimony of P. H. Mason.)

dicating)?     A. Yes, sir.

Q. Well, this place, this other place down near here you made the sounding as near as you can tell?  
[347]

A. Well, I can tell the place I made three at right angles right across this way.

Q. And this place down here, that the first one?

A. In here.

Q. Well, I thought you sounded a line down here?

A. Well, I sounded a line down here.

Q. Well, place—     A. Take it here then.

Q. Well, you sounded there, here and here?  
Where is the furtherest one you say?

A. To the southeastward.

Q. Yes, to the southeastward?     A. Right here.

Mr. JENNINGS.—Mark it a little different.

WITNESS.—I understand that.

Mr. JENNINGS.—I know, but we want to get it in the record. Now, the first point he wants, just mark “B.”

Mr. CHENEY.—The first one is “A.”

Mr. JENNINGS.—That is “A.” Get it all mixed up if you have the same numbers.

Q. (By Mr. CHENEY.) Well, if you mark this one “B” and that one “C.”     A. All right.

Q. “B” and “C.” Now, this one was, as you stated to Judge Winn, about on a line with the entrance of the—     A. Yes, sir.

Q. —harbor, what you call the entrance of the harbor. Now, did you sound any between here and the trap?     A. Yes, sir.



(Testimony of P. H. Mason.)

Q. On a line?

A. As near as could run it with a steamer. [348]

Q. As near as you could run it with a steamer?

A. Yes, sir.

Q. You was doing this sounding with the steamer?

A. Yes, sir.

Q. The "Anna Barron"? A. Yes, sir.

Q. Well, about how far apart were your soundings in here, Captain?

A. Just as fast as we could throw the lead line in and heave it.

Q. How far about would that be?

A. Not over a hundred feet.

Q. Not over a hundred feet? A. No, sir.

Q. Well, let's see "B" and "C" and another place, mark it "D," about where do you think that point would be from this one, over in this direction, this is about 100 feet this way? A. Well, in here then.

Q. All right, "D." And you sounded over to the trap in that line?

A. With a line, yes; I say approximately, may have been further out this way.

Q. Over there about south of where that reef of rock marked "reef" is? A. Yes.

Q. Well, now, will you tell the Court about what depth of water you found here at the point, about?

A. Oh, twenty fathoms.

Q. Would be over twenty?

A. Well, say twenty fathoms and a half; about twenty fathoms would be accurate.

Q. About twenty fathoms? A. Yes. [349]

(Testimony of P. H. Mason.)

Q. I will put just twenty there then, Captain. Now, what is your estimate that the water would be at point "D"? A. Well, say twenty-five fathoms.

Q. Twenty-five fathoms; mark that twenty-five.

A. Yes; mark it twenty-five.

Q. And then as you came over to the trap it was still deeper? A. No, sir; here it was less.

Q. It was less in here. About how many fathoms in here?

A. I don't think it was over fifteen. I am not positive, but I don't think it was over fifteen.

Q. Let's say ten—mark this approximately in here, Captain? A. Yes.

Q. In there about how many fathoms?

A. About fifteen.

Q. Fifteen. Well, now, Captain, you say the "Anna Barron" is about ninety feet long?

A. Yes, sir.

Q. Well, in order to be very safe, you think that Mr. Barker is about correct when he says she needs about 250 feet of line so she could swing in a circle of 500 feet?

Mr. WINN.—Mr. Barker didn't testify to that.

Mr. CHENEY.—Mr. Barker did.

Mr. WINN.—No, he did not. You have got him mixed up with Mr. Barron. Doesn't make any difference.

Q. (By Mr. CHENEY.) Well, then we will ask the Captain, how many feet is the usual swing then?

A. Depend on the water.

Q. I don't mean with a storm on, Captain?

(Testimony of P. H. Mason.)

A. Ordinarily?

Q. Yes; ordinarily. [350] A. About 300 feet.

Q. About 300 feet. Well, now you would want for a boat like that coming up to the waterfront you would want plenty of deep water, wouldn't you? You wouldn't want to run here into shallow water?

A. Well, I go into water that is safe for her to lie afloat. Don't care whether extraordinarily deep water.

Q. Well, the way you have marked this up here from this line east, from this line of piles over to this point called bare rock you have got it marked 16 or 12 feet, is it, or fathoms? A. Fathoms, yes.

Q. You wouldn't consider that a safe place at any time for a boat landing, place for a boat of that size?

A. Yes, 16 feet.

Q. 16 feet. 12 feet? A. Not 12 feet.

Q. No, not 12 feet, but 16 feet or deeper?

A. Well, ordinarily should be; don't want perfectly shallow water.

Q. But if the tide runs out and you had to move, as you stated a while ago you would have to go out with the low water any way, you would have to go back from this line to get deeper water when the tide runs out? A. Come out this side.

Q. Have to come out further? A. Southeast.

Q. Yes. Well, now, looking at this matter just as a question of where the most feasible place would be to run in with the "Anna Barron," supposing there is no trap here at all, Captain, haven't anything in front of that ground at all? A. Yes. [351]

(Testimony of P. H. Mason.)

Q. You say that the most feasible place is, as you stated here to Judge Winn, to come right in through here up towards this end of the beach, about midway between the line of piles and the place called bare rock? You say that is the feasible place to come into the upland, do you? A. Yes.

Q. What? A. Yes, sir; I certainly do.

Q. As a matter of fact, Captain, you know that this is a—there is a shelf in here or we might call it a back—I don't know, I am not a seafaring man, you know—but any way it is much shallower in here, Captain, than it is in front of the eastern part of this claim, isn't it? This is the deeper water over here?

A. Over here, no, sir; I think so.

Q. Yes.

A. I don't think anything about it. I know it.

Q. Yes. You know it is much deeper water. Now, with a southeaster blowing, you say you consider that a good harbor for a southeaster?

A. Fairly good harbor.

Q. Fairly good harbor. You consider that a fairly good harbor. You wouldn't say it was a good harbor? A. No, sir; I would not.

Q. But when there is a southeaster blowing, we will say, you mean to tell the Court now you would consider it a safer place for the "Anna Barron" to lie at anchor over in here, in this line, between the lead and the bare rock, midway, than it would be over here in the deeper water?

A. Yes, I would anchor here.

Q. What? [352] A. I would anchor here.

(Testimony of P. H. Mason.)

Q. You would anchor in here on eastward of the trap?

Mr. WINN.—About where is here?

Q. (By Mr. CHENEY.) Now, if you were coming in here and wasn't any trap at all—

Mr. WINN.—I would like to have the pencil put on the part of the water.

Mr. CHENEY.—Where this trap is.

COURT.—Ought to have it marked, Captain.

Q. What figure is that?

A. That is an "X," just put that as a cross near to indicate that figure.

Q. All right.

Q. (By Mr. WINN.) About where the words—  
what words are there? A. No words there.

Q. (By Mr. CHENEY.) Well, Captain, you just simply say if there wasn't any fish-trap here at all and you were coming in here with a southeaster blowing, you would consider this a better anchorage than you would in here, that is what I understand you to say?

Mr. JENNINGS.—That doesn't get it into the record.

Q. (By Mr. CHENEY.) Well, you would consider it a better anchorage on the east side of where the trap is now located than you would on the west side of the trap? A. Of course, I would.

Q. Yes, because it is deeper water out in here?

A. Yes.

Q. Yes. A. Got more room.

Q. Now, Captain, isn't it a fact that there is at



(Testimony of P. H. Mason.)

least 125 feet of level land to the eastward of this place marked "high [353] bluffs" and between these places, the place marked "high bluffs" and the east line of this claim, isn't that low land?

A. No, it is upland.

Q. What?      A. It is cliffs.

Q. Cliffs?      A. Yes.

Q. Do those cliffs extend clear out to this line?

A. Yes, sir.

Q. They do?      A. They do.

Q. Then Mr. Hill's map where he has marked it "high bluffs" out to here and stop, isn't correct? If you were making this map you would have made the cliffs, high bluffs, clear out here?

A. No; not clear out; I wouldn't do it too far, but I would just say the cliffs did go to here, within a few feet of that.

Q. Within a few feet of this eastern line?

A. Yes.

Q. Did you ever build any wharves, Captain?

A. Not actually had the control of doing it, but I have helped do it and seen lots of them and have an idea how it should be done.

Q. If you were going to build a wharf and you had two places to build it from and the ground was the same, Captain, in front of each place, but at one place the shore was shelving and shallower there, and you had to go out, say, 500 feet from the line of ordinary high tide, and at the other place you would only have to go out about 200 feet to get sufficient depth of water, which would in your opinion be the best and

(Testimony of P. H. Mason.)

cheapest place to build that wharf? [354]

A. You have asked me two questions.

Mr. WINN.—Now, wait. It isn't a proper hypothetical question. The hypothetical question must be based on some evidence—evidence in the case.

Mr. CHENEY.—His evidence is in the case.

Mr. WINN.—I didn't go into the question of the Captain being an expert wharf builder, but I don't object to that ground, but I say it isn't a proper hypothetical question, not based on anything in this case.

Mr. CHENEY.—I base it on this witness' testimony.

COURT.—Just read the question.

Q. (Read by Reporter.) If you were going to build a wharf and you had two places to build it from and the ground was the same, Captain, in front of each place, but at one place the shore was shelving and shallower there, and you had to go out, say, 500 feet from the line of ordinary high tide, and at the other place you would only have to go out about 200 feet to get sufficient depth of water, which would in your opinion be the best and cheapest place to build that wharf?

COURT.—He may answer the question. Objection overruled.

Mr. WINN.—I will take an exception.

Q. (By Mr. CHENEY.) You understand the question now, Captain?

A. Well, are you referring to this particular place?

(Testimony of P. H. Mason.)

Q. I am just putting the hypothetical question.

A. To answer at random to some other place?

Q. Just for an answer, that is all.

Mr. WINN.—I object because no sufficient foundation laid; not proper cross-examination, and not a proper hypothetical question.

Mr. CHENEY.—The objection has been ruled on.

COURT.—He may answer. [355]

Mr. WINN.—I put some other grounds to the objection.

COURT.—He may answer.

Mr. WINN.—I will take an exception.

A. Well, taking any place.

Q. (By Mr. CHENEY.) I am not confining you to any particular place, Captain.

A. Is the cheapest place the littlest distance you have to drive a wharf if the grounds are equal would be the cheapest way.

Q. And if you were driving a wharf under those conditions, of course, you would drive the shortest wharf, that costs the least money?

A. I would if I had the doing of it.

Q. In other words if the driving ground is equal, the same kind of driving ground, if you can reach deep water, say, 35 or 40 feet of water with a dock of 200 feet, you consider it would be much better and cheaper to build it there than where you have to run 500 feet to get the water?

Mr. WINN.—That is self-evident.

COURT.—Yes, that is self-evident.

Q. (By Mr. CHENEY.) Yes, I suppose so.

(Testimony of P. H. Mason.)

Well, you say—you said, Captain, that the water is much deeper over here in front of the east end of this claim than it was in front of this other, the sandy beach on the west end?     A. Yes, sir.

COURT.—Any further cross-examination, gentlemen?

Mr. CHENEY.—Yes, I am through.

Mr. JENNINGS.—I want to ask a question.

Q. Captain, I call your attention now to that part of exhibit “D”—     A. That is “A” up there.

[356]

Q. Plaintiff’s Exhibit “D”—on Plaintiff’s Exhibit “D” you see a place marked “bare rock” and a place marked “reef” and you see the pot and filler (spiller) and the heart and the filler (spiller) of Mr. Alexander’s trap and you see the lead line of Mr. Alexander’s trap?     A. Yes, sir.

Q. Now, I want to call your attention to the space in between there, what is the nature of the space—of the bottom—the nature of the bottom there in that space, is it rocky, sandy or good holding ground, or what?

A. Well, from the indications that we get with the lead it is what I call a medium bottom, neither sandy nor muddy, but when the lead strikes the bottom it strikes hard, but we don’t strike rocks.

Q. Good driving ground though, isn’t it?

A. Very good.

Q. Good driving ground from—from the shore line clear out to Alexander’s—to the heart of Alexander’s trap, isn’t it?     A. Yes, sir.

(Testimony of P. H. Mason.)

Q. Over in that space. Well, now if a wharf were built beginning at the point marked "low" on the beach line of this claim, you see the word marked "low," and extended out to a point midway between the point marked "reef" and Alexander's trap, wouldn't there be plenty of room for the "Anna Barron" to go in and tie up to that wharf?

A. Not with a trap there.

Q. Why not?

A. Because there is not room.

Q. Why, how long is the "Anna Barron"?

A. Ninety-odd feet.

Q. What beam has she got? [357]

A. I think twenty-five.

Q. Twenty-five feet beam and ninety feet long. What is the distance between the reef and the pot, the pot of the trap? A. 300 feet, I guess.

Q. 300 feet? A. Yes.

Q. Now, mark you, Captain, I am not talking about the "Anna Barron" going in there with a tow of piles. I am talking about the "Anna Barron" going up there and landing, just like steamers land at wharves, just like the wharf at Haines or the wharf at Douglas, or the wharf at any other—Killisnoo, or any other of the little ports around here, you mean to tell me that the "Anna Barron" couldn't go up there and discharge her—her carboys of gasoline or oil and just put that on the wharf and come out, you don't think there would be room for the "Anna Barron" to do that? A. I do not.

Q. Notwithstanding it is—how far did you say?



(Testimony of P. H. Mason.)

A. I am not exact, but I think about 300 feet.

Q. 300 feet, and the "Anna Barron" is only twenty-five foot beam and ninety feet in length?

A. Yes.

Q. There is plenty of water there, isn't there? There is plenty of water there, isn't there?

Mr. WINN.—Now, if your Honor please, I want to object to the question—

Mr. JENNINGS.—Which question?

Mr. WINN.—The question right now.

Mr. JENNINGS.—The question I put to him, I am propounding now.

Mr. WINN.—Yes, sir. If it please the Court, it was understood some time ago that portions of the testimony of [358] that kind would go in under objections, but I wish to state my objection to this question so to get the record clear on it: that he should confine himself to this land in front of us and not to the land clear over here in front of the reef. We don't own this; don't claim it.

Mr. JENNINGS.—I say between the line of the lead and the eastward.

Mr. WINN.—Yes; the reef is beyond the extension of our claim; simply want to get the object—incompetent, irrelevant and immaterial for any purpose because the distance between the heart and the filler (spiller) of the trap, and the reef is one-half or two-thirds of it in front of other land that is not owned by us and that we simply are asking for access over the water that lies immediately in front of our property. I think therefore the question is incom-

(Testimony of P. H. Mason.)

petent, irrelevant and immaterial unless it is confined to that space. Now, in order to save objections extending to this kind of questions, may it be understood that this objection goes to all questions asked the witness when he goes outside the boundaries of our property or outside of the water in front of our property. Is that understood?

COURT.—Yes.

Mr. BURTON.—And this applies also to the question Mr. Jennings asked about building a wharf from that point of the upland and out beyond the prolongation of the southeasterly end line of that claim to a point midway between the reef and the piles.

Mr. WINN.—I think he confined the wharf by the proper boundaries, but now coming to measuring the water; not giving us a right of way over somebody else's property. We are not asking for somebody else's water. [359]

Q. (By Mr. JENNINGS.) You say the reason the "Anna Barron" couldn't get in there would be on account of the water. Plenty of water there?

A. Yes, sir.

Q. Yes. Now, how far did you say it was from the reef to the trap?

A. I think approximately from the—about from the northern end of that reef is 300 feet.

Q. From the end of the reef to the trap is 200 feet?

A. 300 feet.

Q. (By the COURT.) 300 feet? A. 300 feet.

Q. (By Mr. JENNINGS.) Now, how much room do you want for a steamer that is only 90 feet long

(Testimony of P. H. Mason.)

and 25 foot beach. How much more room do you need?

A. There are at times you can't turn the "Anna Barron" around or any other steamer in 500 feet.

Q. I didn't ask you about turning her around. You can back out? A. Sometimes you can.

Q. Doesn't the "Anna Barron" back?

A. Of course she does.

Q. A steamer going into a wharf doesn't always turn around? A. Not always.

Q. Quite often can't turn around, have to back out. Well, how much—suppose you have 325 feet distance between the reef and the—and the trap, would you say she could get in there then?

A. She can go in.

Q. And come out? A. Yes.

Q. Well, now, Captain, if the distance between that reef and the [360] trap is 330 feet, there wouldn't be any doubt about it, would there?

A. Yes, there would be a doubt about it.

Q. Well, you just now said she could come in if there was 325 feet. If she could come in with 325 feet and out again, when I asked you about 330 feet you say there is a doubt about it. I don't understand it?

A. Well, we will say she can come in.

Q. She could come in? A. Yes.

Q. She could come in and discharge her cargo and get out?

A. By placing that wharf out at that place and you couldn't hold a wharf there, wouldn't be safe

(Testimony of P. H. Mason.)

to put a wharf.

Q. I didn't ask you anything about that.

A. That is right.

Q. I just asked you if room enough for the "Anna Barron" to come in and you just now testified that was all good holding ground in there and just now testified—

A. I didn't—my experience is that is good hold ground, certain parts of it. I put the pencil where it is good holding ground.

Q. Well, now, if you call it good holding ground at those particular places—

A. Only between the line that is where I have tested down to the bottom.

Q. Well, I asked you if at all these places around there you sounded and made soundings, lead soundings here and whether or not you found the same general conditions in one place as you did at the other, in this space, the formation, and you said yes.

A. But you got your hand around in there in about every place. [361]

Q. Just where you made soundings here and where your soundings are?

A. Well, so far as I can tell the bottom is about the same.

Q. About the same?      A. Yes.

Q. Well, then, why did you say you couldn't hold a wharf out there?

A. I won't say that you can't hold that, can do anything.

Q. Well, why did you say you couldn't hold a

(Testimony of P. H. Mason.)

wharf out there?

A. You can; you can hold it anywhere.

Q. You can build a wharf out there?

A. Anywhere you can get bottom.

Q. You can build a wharf out there that would hold there, wharf for the "Anna Barron" to get in and discharge her cargo and get out without interfering with that trap or without that trap interfering with it?

A. No, sir; that trap interferes with the whole thing.

Q. I am not talking about mooring logs or mooring piles or anchoring the "Anna Barron." I am just talking about a wharf, a discharging wharf. You mean to tell me that the "Anna Barron"—that a wharf couldn't be built there at all where the "Anna Barron" could have a landing place?

A. No, sir; I do not. I just said you can build a wharf anywhere you want to that the "Anna Barron" can get to or any other steamer.

COURT.—Is that all, gentlemen?

Mr. JENNINGS.—No, just one more.

Q. You say that you couldn't get in and you seem to say that this trap would interfere with that as a harbor for going in there if you had a tow of logs. How do you expect to get in there as a harbor if Mr. Barron builds a trap in there? [362]

A. I don't know whether Mr. Barron is going to build a trap in there or not.

Q. If he built a trap there, it would absolutely destroy the harbor as a harbor of refuge?



(Testimony of P. H. Mason.)

Mr. WINN.—I object to the question as not a proper hypothetical question; not proper recross-examination, your Honor.

Mr. JENNINGS.—I withdraw the question.

Q. Now, you said, Captain, that a fish-trap built there is an absolute menace to navigation?

A. To that harbor.

Q. Yes, sir.

Mr. WINN.—Let him answer.

COURT.—Yes.

A. Quite long. I don't understand the question properly.

Q. (By Mr. JENNINGS.) Now, you said, Captain, that a fish-trap built there is an absolute menace to navigation? You said that?

A. I say that trap the way it is constructed now is absolutely a menace to navigation to that particular upland.

Q. Well, then that trap in that neighborhood, in that little harbor, is an absolute menace to navigation running out into that harbor—is a menace to navigation?

Mr. WINN.—Now, wait a minute. This is just the very same question that Mr. Jennings asked a few minutes ago. Of course, now that gets around to another condition of affairs. Suppose we constructed another trap down here any way, or over here in this side line, or constructed [363] it over here. We go into a new field entirely.

COURT.—I think it might be competent for this reason, Judge Winn, it might be that in determining

(Testimony of P. H. Mason.)

this matter, suppose the Court concluded that a portion of this trap was a menace to navigation or prevented you from entering your upland, may be material to know whether a trap can be built there which would not obstruct your entrance.

Mr. WINN.—All right, your Honor, I will withdraw the objection.

COURT.—Although I think it is practically admitted because I understood Mr. Barron to say that was the only place a trap can be built in that harbor.

Mr. CHENEY.—That is what this witness swore to on the last trial. I think he will admit it, that is the only place.

Mr. WINN.—Well, go ahead.

COURT.—He may answer the question Mr. Jennings propounded.

Mr. WINN.—Now, did you get the question. I withdraw my objection.

COURT.—Just read the question.

Q. (Read by Reporter.) Well, then, that trap in that neighborhood, in that little harbor, is an absolute menace to navigation running out into that harbor—is a menace to navigation?

Mr. WINN.—Then on that navigation part—object to it—the question is where we are trying to reach the upland.

Q. (By Mr. JENNINGS.) What is your answer?

A. Any trap built there would be a menace to the harbor.

Q. Would it—any trap built in—any trap built in there in front of survey number 804, be a menace to navigation?

(Testimony of P. H. Mason.)

A. Any trap built on this line the same as that trap is will be an absolute menace to navigation of that harbor. [364]

Q. Could you build a trap in that harbor that wouldn't be a menace to navigation?

A. That I haven't studied to see whether you can or not.

Q. Suppose that trap instead of the lead line being the way it is, suppose the lead line over this way?

A. I think it would be useless.

Q. Well, I am not asking about whether you think it would be useless or not. I am asking you whether that would be a menace to navigation if that line instead of running the way it does now, ran over so it was tied to a post at a point, tied to the upland at a point to the west of survey number 804, would that be a menace to navigation then? A. No, sir.

Q. Wouldn't be a menace to navigation?

A. No, because anybody can go between the trap and the land and you would have plenty of water to the right, but I don't think anyone will ever run a lead that way.

Q. You think that that lead has got to be just in that fix, in that direction and that angle approximately in order for a trap there to be of any use whatever? A. To make a fish-trap out of it.

Q. Do you mean to say, Captain, that you could build a wharf between—on the—that you can't build a wharf on the southeast end of this claim 804 between the end of Alexander's lead and the east end of the claim?

(Testimony of P. H. Mason.)

A. I don't mean to say you can't do anything.

Q. As a matter of fact, Captain, there are piles there are not driven all the way now—driven all along Alexander's lead clear up to the shore, aren't there?     A. No, sir.

Q. Up to about how far from the shore?     [365]

A. About 140 feet.

Q. About 140 feet? Do you know anything about the shore bottom between that 140—between that—between where his piles range off and the shore? Do you know anything about the bottom?

A. Only just by the lead, by the lead.

Q. You found that, did you?     A. Yes, sir.

Q. And you found this what?

A. Hard, rocky bottom.

Q. Hard, rocky bottom, and still you could put a wharf there, couldn't you?

A. I just said you could do anything you wanted to.

Q. And when you get 140 feet out, why Alexander has already driven piles for his lead, hasn't he?

A. I think he has driven piles as far as he can.

Q. I didn't ask you for what you thought. Just asking for a fact.     A. That is a fact.

Q. When you get 140 feet from the shore you strike piles of Alexander's?     A. Yes, sir.

Q. Well, if he could build piles there somebody else could?     A. I suppose so.

Q. If he could drive piles?

COURT.—Any further cross-examination, gentlemen?

Mr. JENNINGS.—No.

(Testimony of P. H. Mason.)

Redirect Examination.

Q. (By Mr. WINN.) Captain, in order to get the matter *before* [366] *the Court remains there* I might have confined my questions to the "Anna Barron" in particular—I wish to ask you another question now. I desire to ask the question if you was going to reach the upland of Mr. Barron's property with any sort of gasoline steamer that are ordinarily used in the fish business, or boats connected with the cannery business, as to whether or not this trap as constructed there would constitute an obstruction to the reaching the upland?

A. Certainly does.

Q. How are the tides there, Captain, around that long—that end of that long peninsula?

A. The tide comes up that peninsula with quite a force, but when it gets up to this harbor it forms an eddy, throwing a back current that it strikes and then comes out maybe 100 feet, 200 feet, 300 feet.

Q. I will ask you if the tide there has something to do with the landing of the steamers, and so forth, and did you take that into consideration in answering these questions of Mr. Jennings? A. Yes, sir.

Q. Of course, when you go to land a steamer you don't land her at full speed at the wharf, do you?

A. No.

Q. But when you go under slow bell and land, in your judgment, what effect on that would the tides have there around this point?

A. Why, with a steamer around there with anything out where you say to put a wharf would be hard to make a landing.



(Testimony of P. H. Mason.)

Q. Would be hard to make a landing like that?

A. Yes, sir.

Q. What did you consider, Captain, when Mr. Jennings got you to qualify on the proper position of building a wharf? Now, [367] suppose you was going to build a wharf there from what you know of the upland and what you know of the land under water and what you know of the winds and what you know of the currents, where would you consider the most practicable and feasible place of wharfing out from there—about how far? Just go over to that exhibit and state to the Court.

A. This would be corner 3 or 2?

Q. No, there isn't any corner there. You see this is the ground. This is the waterfront.

A. This is the waterfront?

Q. Yes, this is the waterfront. Here is where the cabin is. You see the cabin marked? A. Yes.

Q. And the sandy beach, I think, is marked "sandy beach."

A. Well, I know. I would come out here.

Q. You would come out about where, the word "mean"? A. "Mean."

Q. Is that it? A. Yes.

Q. And which word "mean" is between the word "high" and the prolongation of the easterly—

A. Westerly.

Q. Westerly boundary line of Barron's claim?

A. Yes.

Q. Now, in your—from the knowledge that you have of the winds, tides, waters, soundings, and so

(Testimony of P. H. Mason.)

forth, how far would you extend that wharf out, approximately, Captain, do you think? Mr. Jennings had you out as far as the trap? A. Yes, sir.

Q. Now, let's see how far you would do it and put in a practicable wharf there. [368]

A. I would come out to 20 feet or 22 feet.

Q. Well, west of what point?

Mr. CHENEY.—Let him answer it.

A. Put a mark right here.

Q. (By Mr. WINN.) Put the "X"?

A. "X."

Q. Yes, sir; a cross. Then that is the point about midway between the words "Barron's piles" and the prolongation of the westerly side line—

Mr. BURTON.—End line.

Q. (By Mr. WINN.) Yes; westerly end line of Barron's claim?

A. Yes, sir. Now, I am confining myself here to Mr. Barron's property.

Q. Oh, yes, that is what I am talking about.

A. I am not confining myself to come down here or come out here.

Q. Oh, no; talking about coming out in front of Barron's property, not wharfing out from somebody else's. Now, with a wharf built at this most practical point to reach this property, would this trap of Alexander's and the leadway of his trap obstruct the landing at this wharf or the reaching, in other words, the reaching of Barron's property? A. Yes, sir.

Q. Now, there is one other question, Captain, you have observed the topography of the country, contour

(Testimony of P. H. Mason.)

of the shore, and so forth, I will ask you if you have had any experience in going into this harbor in the night-time?

A. It was night when—the last two—when I was towing there both times was night.

Q. Well, now, Captain, knowing the contour of the shore line there and the topography of the country and the mountains and hills, and so forth, suppose that you were entering [369] there in the night-time with this trap in there the way it is there now, I wish you would explain to the Court what, if in any, way that would be a special obstruction in the way of entering there at night.

A. Well, sometimes in entering that place or any other place, the trap—you will get right onto it before you see it. The shadow of the land somehow or other spoils the view of the trap and I have been frequently right alongside of a trap or dolphin or scows. Knew it was there somewhere, but couldn't see the dolphin at the time being; not only myself but lots of others right on the ships. The boats do it continuously.

Q. Now, you testified for Mr. Cheney, I believe, that you had been in there twice with a tow of logs. Well, now, last year the trap was in there, of Alexander's? A. Yes.

Q. Well, you was only towing for Barron the year before? A. That is—

Q. Last year and this year? A. Yes, sir.

Q. So, the times you seen it was year before last when the trap was not in there? A. Yes, sir.

Q. You didn't try to get in there this last season,

(Testimony of P. H. Mason.)

did you?      A. No, sir; I did not.

Q. Yes. Mr. Cheney asked you something about, I think, the possibility of building a wharf or something on the—between the lead of this trap and the prolongation of the east side line—

Mr. BURTON.—End line—

Q. (By Mr. WINN.) —east end line of Survey 804 of this section—[370] the section there. Put a pencil and mark it there. I don't know whether indicates in the record or not. What would you say about the practicability of building a wharf out from that waterfront of Barron's claim which I have just referred to in that question?

A. Well, this part in—this part right here, you have a high bluff and it shelves off down to low-water mark, is all rocky, got all slime or shells, or whatever you may call it, and gradually slopes right down until it comes to low water; but this is high bluff here. To get a wharf there have to start that wharf at the height of that bluff.

Q. I see. Well, how about the winds, the tides or water there, is that a practicable place of entering this property of Barron's on the water?      A. No.

Q. Well, now, suppose you built a wharf out there—supposing it could be done from any point on that, would Alexander's trap and his lead line all be in the way of landing at a wharf *built that on that side?*

A. Yes, sir; certainly; have to come up, follow this lead, I think, in fact I know have to follow that lead and then you wouldn't have the distance up here and

(Testimony of P. H. Mason.)

there or have any room for handling a boat.

Q. Now, I will ask you, Mr. or Captain Mason, if you observed where Alexander, the defendant in this case, always moors and anchors his boat and where he kept them while he was fishing out there and his scows or things of that kind. On what part of this ground did he keep them all last summer when fishing?

A. That is one of the things I paid particular attention to.

Q. Yes, sir; just tell the Court. [371]

A. Here off his trap he has one dolphin or mooring pile.

Q. He has one pile or dolphin off near his cabin out— A. Yes, sir.

Q. —here, marked “A” on this exhibit?

A. Yes, sir; but I never saw any scows or anything but the small boat, dory, put there, but here on this corner here, on the northwest corner of this trap that is where I have seen his boat scows and his boat and everything else that he had, the paraphernalia would be tied up in here to the trap.

Q. So, he used the ground then under the water between the trap and the long peninsula?

A. Yes, sir.

Q. Is his general tying-up and mooring ground?

A. That was when I was there.

Q. Yes. I believe that is all.

Recross-examination.

Q. (By Mr. CHENEY.) Captain, I want to ask you a question about the tides Judge Winn asked you about coming in under slow bell a harbor of this



(Testimony of P. H. Mason.)

kind if the swiftness of the tides wouldn't be liable to affect a boat running at slow speed, and you said it would. That is right? A. Yes, sir.

Q. Now, I will ask you, Captain, if it isn't a fact that the tides that come in around this point here into this harbor are much swifter and the water is much more swift when you are coming in around there than they are over here after you get over in this part of the survey? A. No, sir; they aren't. [372]

Q. They aren't? A. Just the opposite.

Q. Isn't it a fact that when the tide comes in, the tide comes from Icy Straits when it comes in?

A. No, sir.

Q. Where does it come from?

A. Flood tide comes up Chatham Straits.

Q. Well, when it goes out where does it come?

A. Comes out Chatham Straits.

Q. Comes out this way when going out?

A. Goes to the southward flood tide. Ebb tide comes northward.

Q. Well, the tide—isn't it a fact that when the tide comes around any point like this point marked "bare rock" along any shore that it is swifter the nearer you get to the point the swifter it is—swifter than it is out further into the harbor, no matter what harbor it is?

A. The tide in here between from here, from this place to Funter Bay, the tide is slower than anywhere else.

Q. (By Mr. WINN.) Where is here?

A. When coming by this particular place there is

(Testimony of P. H. Mason.)

no tide in here, in here whatever.

Q. Take in here?

A. At this point here?

Q. Yes.      A. Along that.

Q. (By Mr. CHENEY.) I don't think you have—you answered the question about some other part of Chatham Straits?      A. All right.

Q. Well, I asked you if it isn't a fact that the tide runs swifter right in around this point here than it does in the other part of the harbor, over here, say, to the eastward [373] of that trap?

A. No, sir; no tide in here whatever.

Q. No tide at all?

A. Not to amount to anything.

Q. There is some tide, isn't there?

A. Very little, because this back current forms an eddy here.

Q. Well, what forms the eddy?

A. The tow of the tide coming up here will throw it back and then it has to go either up or down.

Q. Well, I mean the tide—you say there is some tide in the harbor, isn't there?      A. Very little.

Q. Well, when there is some tide in the harbor, I asked you if the tide wouldn't run swifter over there near this point of rock marked "bare rock" than it does over here in front of the eastern portion of Barron's claim?      A. No, sir.

Q. All right, that is all.

Mr. WINN.—Is that all?

Mr. JENNINGS.—I just want to ask another question.

(Testimony of P. H. Mason.)

Q. Just sit down. You see these five piles at the extreme left forming the extreme left boundary of what is called Alexander's trap, don't you?

A. Yes, sir.

Q. Five piles. Now, suppose that was a wharf, Mr. Alexander wanted you as captain of the "Georgia" or the "Barron" to deliver him a ton of provisions on that wharf, could you do it?

A. Yes, sir.

Q. Wouldn't have any trouble, would you?

A. May have some trouble, can do it.

Q. You could do it? Wouldn't be any feat at all?

[374] A. I hope not.

Q. Can go in there and dump off a ton of potatoes, or whatever is wanted there, with the "Anna Barron" and get out if that was a wharf instead of a fish-trap?

A. Yes, sir.

Q. All right. Suppose this wharf of Mr. Barron's that he is going to build begins on the beach at the word—at where the word "low" is there on the beach, and runs right out to that fish-trap, couldn't the "Barron" do this same thing?

A. Why, yes, if the trap wasn't there.

Q. What would the trap have to do with it?

A. Then there would be no trap there.

Q. You said you could do it there if those five piles were a wharf instead of a trap?

A. With these five piles you can't make a wharf.

Q. I am talking about the end of the wharf. If that trap was a wharf instead of a trap you can do it?

A. Yes, sir; the trap would be away.

(Testimony of P. H. Mason.)

Q. What?      A. The trap would be away.

Q. But the wharf would be there, wouldn't it?

A. Guess so.

Q. Now, what is the matter, what is to prevent Mr. Barron from running his wharf from the word marked "low" out to that trap and use that there for the face of his wharf right next to the face of that trap? What is to prevent that?

A. Would any man allow any wharf to be facing his trap?

Q. What?

A. Would any man allow any wharf to be facing his trap?

Q. You know, Captain, Mr. Barron isn't suing for an injunction— [375] I mean we are not suing Mr. Barron for an injunction. He is suing us. We are not talking about whether a wharf would interfere with the trap. We are talking about whether the trap would interfere with the wharf, and maybe a person who owns a trap wouldn't be willing to let a wharf go out there because spoil his fish-trap, but that isn't the question. You answer the question I asked.

A. If they built a wharf from Mr. Barron's property out to the fish-trap, the heart or spiller, whether the "Anna Barron" could land there, is that the question?

Q. Yes, sir.      A. She could land there.

Q. She could land there?      A. Yes.

Q. And discharge her freight?      A. Yes, sir.

Q. And get out?      A. Yes, sir.

Q. Without trouble. All right.

(Testimony of P. H. Mason.)

Re-redirect Examination.

Q. (By Mr. WINN.) Now, as I understand you to say, Captain, no one with any common sense would build a wharf out there in that swift water there, swirling boil of waters? A. No.

Mr. CHENEY.—He said there isn't any tide there next to that point.

Q. (By Mr. WINN.) Now, Captain, did you tell Mr. Cheney there isn't any tide down here next to this reef? A. No, I did not. [376]

Q. You told him that back inside there wasn't any tide? A. That is what I did.

Q. Now, then, explain to the Court why it would not be practicable or common sense to build a wharf clear out here to the end of this bare rock or this reef to have a landing place?

A. Well, in the first place, be more sea, be more tide, and you have both more wind from the north-east and the southwest to contend with.

Mr. WINN.—That is all.

Re-recross-examination.

Q. (By Mr. JENNINGS.) And the water would be too deep? A. No; not too deep.

Q. About sixty feet of water there?

A. Not at the end of the trap.

Q. Pretty nearly sixty feet?

A. No, sir. What do you call pretty nearly?

Q. Well, there is fifty feet? A. Yes.

Q. (By the COURT.) Now, Captain, I would like you to tell me all the reasons you know against the feasibility of the construction of a wharf from the



(Testimony of P. H. Mason.)

end—from the easterly end of this survey out to deep water?

A. Well, simply, your Honor, just as I have stated before. You have an abrupt bluff that makes up high, it shelves down as far as I have seen below water, nothing but rocks to the low-water mark. Now, what is beyond that we have found hard bottom, and I don't know whether there is rocks or not. Sometimes you can put a pile on and drive it, it [377] will go down a foot and strike hard bottom and then you can get it no further; but this place here as have just represented, that is certainly an abrupt bluff, and it is almost impossible at high water to walk past this place unless get up on the timber land.

Q. Now, I have asked you, Captain, to state all the reasons—I want all the reasons without putting any suggestions to you against the feasibility of the construction of a wharf at any point beyond the lead line of the defendant and the prolongation of the easterly end line of plaintiff's?

A. I think I have stated my reasons for not building a wharf there.

Q. And those are the only reasons you know of?

A. Yes, sir.

Q. And those are the only reasons you know of against the feasibility of a wharf at that place?

A. Well, it is not—a wharf built there certainly wouldn't be as secure there for safety as one here.

Q. Well, now, I want you to get all of the reasons.

Mr. WINN.—The Court wants all of the reasons.

A. For the first place, there is a good tide here and

(Testimony of P. H. Mason.)

in the second place, I think, with a southeast wind we have the longer reach to draw, and here maybe 500 feet from this place the wind does not have the effect that it would here.

Q. (By the COURT.) Now, Captain, didn't I understand you to say in response to Mr. Cheney's question that particularly when the southeast wind was blowing that would prevent a landing place easterly of defendant's lead line?

A. I did. I stick to that yet, if I had to go in there.

Q. Well, now, isn't it true that you are better protected from any other wind in that harbor than the southeasterly or the [378] south wind, isn't that true?

A. Well, with my experience there, Judge, the southeast wind does not draw up this coast easterly, from the southeast coast in on the land.

Q. What direction do they blow?

A. It goes more to the eastward off the land, but if you get a half mile or a mile into Chatham Straits you will find the wind there of much more velocity and coming straight up from the southeast.

Q. Well, then, why do you say that would prevent a landing place at the point you have marked here east of the defendant's lead?

A. Now, I should prefer to drop my anchor here and if the wind increased I would have much more room to give her rope to extend out towards this shore.

Q. If that is the case then, Captain, why wouldn't

(Testimony of P. H. Mason.)

it be better to have your wharf so extended to have the face of it somewhere here, somewhere in the vicinity of the point you have marked east or easterly of defendant's line?

A. Well, I think that it would cost a good deal more to put a wharf from here, than it would from here.

Q. That is, I want to know just the reason, would it be because cost more to construct your wharf. While you are here as an expert and I want the definite information. I have got to make a finding and I want to ascertain just the reasons against the feasibility of the construction of a wharf from the easterly shore line of this claim to deep water?

A. Well, I don't think a wharf can be constructed here with any safety from this bluff out to the westward. I think it is impracticable, but it is practicable to build a wharf from here out here. [379]

Q. Now, why is it impracticable to build a wharf?

A. Well, from what I have seen and what I know of the rocks on the shore.

Q. Well, now, that is the only reason, Captain?

A. Yes, sir.

Q. So far as the land out there, and if you had a wharf built there, so far as the bottom of the land at the face of the wharf it would be just as good a place to land as any other place in the harbor?

A. No.

Q. It wouldn't be?

A. No, sir, the further you get this way the more you have to contend with the wind from the north-west and west.

(Testimony of P. H. Mason.)

Q. Now, Captain, I want to understand your testimony, if I can, but I understood you to say in response to Mr. Cheney's question that this point you have marked easterly of defendant's lead was the most feasible place to anchor a boat when the southerly or southeasterly winds were prevailing?

A. I would put the bow of the boat up here and the anchor would be here and the boat would be here.

Q. The anchor of the boat would be—

A. Would be here.

Q. At that point, Captain, and the boat would be here?     A. In here somewhere.

Q. Now, make a mark, just where exactly you want it?

A. Well, say with a southerly wind, have an anchor 800 pounds, have a coil of rope 125 fathoms and if come in there with a southerly wind, I would certainly give her 75 fathoms and 75 fathoms from that and up to this, about 400 feet, hain't it?

Mr. CHENEY.—450 feet. [380]

A. 450 feet. That would anyhow bring your boat in here somewhere. You would have to have that much room to swing.

Q. (By the COURT.) I think I understand you, but there is one more question, Captain, what wind, —winds are the greatest menace to this harbor?

A. The greatest winds in my estimation would be a southwest and a west wind.

Q. Yes.

A. But I want to state further that in two years' experience I have never seen a west wind strike ever

(Testimony of P. H. Mason.)

on that shore in that bight. I don't say it don't do it, but I have never seen it.

Q. The harbor, as I understand you, is well protected from northerly and easterly winds?

A. Yes, sir.

COURT.—That is all.

Mr. WINN.—That is all, Captain.

COURT.—Will be in recess until half-past one.

[381]

One-thirty P. M., same day.

P. H. MASON, heretofore duly sworn, being recalled, testified further on behalf of plaintiff:

Cross-examination.

Q. (By Mr. CHENEY.) Captain, you are more or less familiar with the shore between high and low tide in front of this survey 804-B, are you?

A. I don't understand the question.

Q. I say you are more or less familiar with the shore that is between high and low tide in front of this survey 804-B you have been testifying about?

A. Yes, sir.

Q. Now, in regard to the building of a wharf at the place where you told the Court was the most feasible, extending, as I understand it, in a southerly direction from the *out out* to where it is designated on the map, towards the Alexander trap, about midway between the reef and the lead line of his trap. I will ask you if you know whether that is good driving ground over the shore between high and low water?

A. So far as the lead goes it indicates very fair ground.



(Testimony of P. H. Mason.)

Q. Oh, well, but I say between the line of ordinary high tide and the line of ordinary low tide?

A. You are not asking about the water?

Q. Not asking about under the water. Just about the shore? A. Yes, sir, fairly.

Q. You think that it would be possible to drive piles on that ground?

A. I don't think any doubt of driving them, but wouldn't be necessary to put that piling down very low between high water and low water mark. [382]

Q. Put them down low into the—

A. Put them deep in the ground.

Q. But do you know whether they could be driven there on that space you have mentioned to the Court as most feasible or whether that is bedrock?

A. No, I couldn't say there is bedrock below, that is possible, but whether could drive the piles I can't see far enough to be safe.

Q. Of course, if going to build a wharf there you wouldn't build it right from the line of ordinary high tide? You would have to go upon the land enough distance so to build your wharf? A. Yes, sir.

Q. Well, I am speaking now of the ground, condition of the ground between ordinary high tide and ordinary low water. A. Yes, sir.

Q. You think you could drive piles there?

A. I do.

Mr. CHENEY.—That is all.

COURT.—Anything further, Judge Winn?

(Testimony of P. H. Mason.)

Redirect Examination.

Q. (By Mr. WINN.) Well, in the building of a wharf even if piles couldn't be driven there, it is very easy on the beach between low and high tide to set them on mud sills or put them on rocks, is it, and place them? A. Yes, sir; can be done.

Mr. WINN.—That is all, Captain.

Mr. CHENEY.—That is all.

COURT.—That is all.

Mr. WINN.—Captain Thornton. [383]

**[Testimony of E. Thornton, for Plaintiff.]**

E. THORNTON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Captain, how long have you lived in Alaska?

A. About twenty-five years, I believe.

Q. How many? A. Twenty-five.

Q. Twenty-five years. And have you followed steamboating a good deal since you have been here in southeastern Alaska?

A. Yes, sir; nearly all the time.

Q. You have served in the capacity of almost everything up to master, haven't you, Captain?

A. Yes, sir.

Q. And for the last few years what position have you been occupying on any of the steamers plying on the waters of southeastern Alaska?

A. Well, the last seven years master of the "Georgia."

(Testimony of E. Thornton.)

Q. Steamer "Georgia." Well, what route does the steamer "Georgia" run and has she run for these past seven years?

A. From Juneau to Skagway and from Juneau to Sitka.

Q. Now, *whether* on your run between Juneau and Sitka have you ever been necessitated to call in at the cannery of Mr. Barron's at Funter Bay?

A. This is a postoffice. Compelled to go there.

Q. It is a postoffice and one of your regular calls there? A. Yes, sir.

Q. Well, how long has that been one of your regular calls, Captain?

A. Ever since the boat has been on the run.

Q. Now—in going from Juneau to Sitka, by the way of Funter [384] Bay, did you ever go up and down the westerly coast of Admiralty Island?

A. Yes, sir; you mean below Funter Bay?

Q. Yes, sir; below Funter Bay. A. Yes, sir.

Q. Below Funter Bay. Now, you have heard considerable testimony and evidence in this case, Captain, about the ground that is embraced in survey 804 and about this little cove or harbor in there. You have heard Captain Mason testify and several others. You have been in the courtroom?

A. Yes, sir; yes, sir.

Q. Now, I will ask you in going on this route between Skagway and Sitka if you have taken any particular notice of this little harbor or cove just in front of this land of Mr. Barron's?

A. Yes, sir; I have.

(Testimony of E. Thornton.)

Q. When did you first become acquainted with that spot, Captain?

A. The first time a good many years ago I took a party of—took a party there that was going back into the mountains to examine a mine or prospect, landed them several times in fact.

Q. I see. Have you been in there several times?

A. Yes, sir.

Q. Now, I will ask you, Captain, if you in your trips between Juneau and Sitka and going up and down this shore of Admiralty Island on which this survey 804 is located, if you have ever taken any notice of the winds and especially the northerly or the easterly winds as they blow up and down this shore?

A. I have, especially the northeast.

Q. Especially the northeast wind. Now, I will ask you in [385] leaving Funter Bay and going down towards Hawk Inlet if there is a strong northerly wind blowing, do you find the same stress of wind all the way between those two points? If not, explain to the Court.

Mr. CHENEY.—Just a moment, Captain. We object to this, of course, your Honor, because we claim it is immaterial to try out whether that is a good harbor or not is immaterial.

COURT.—He may answer. I don't know just the extent of the materiality at this time.

WITNESS.—What do you want?

Q. (By Mr. WINN.) I asked you if you ever noticed the northerly winds in traveling up and down the shore of Admiralty Island when they were blow-

(Testimony of E. Thornton.)

ing as to whether or not you had found the same stress of wind all the way from Funter Bay down to Hawk Inlet?     A. It decreases.

Q. It increases to what?     A. It decreases, I said.

Q. Oh, it decreases?     A. Yes, sir.

Q. The northerly wind as you go down from Funter Bay toward Hawk Inlet decreases?

A. Yes, sir.

Q. Now, suppose you leave Hawk Inlet and was coming up along this shore with a tow where between Hawk Inlet and Funter Bay would you be apt to strike the stiffest breeze?

A. You would strike the stiffest breeze beyond—beyond that little bight that you have described.

Q. That is I have described—

A. To the northward of it.

Q. That is when going up you would strike the stiffest part [386] of the breeze as you pass that little peninsula-like that comes out there near Barron's survey?     A. Yes, sir.

Q. Now, when were you in this place last, Captain?

A. I don't remember whether it was the 10th of this month.

Q. The 10th of this month?     A. Yes, sir.

Q. Were you out there at the time "Lloyd Hill" went out?     A. Yes, sir.

Q. At whose instigation, Captain, did you go out there on the 10th or 11th of March?

A. I was asked by Mr. Barron to go down there and take a look and see what I thought of conditions down there in regard to the entrance.



(Testimony of E. Thornton.)

Q. In regard to getting from deep water to his upland? A. Yes, sir.

Q. Now, this is an exhibit "D," which Mr. Hill has drawn and has been offered in evidence in this case, I will refer you to that, Captain, and ask you if—if you observed upon the ground out there at this date any piles or piling in front of this survey of Mr. Barron's? A. Yes, sir; I saw the trap, fish-trap.

Q. How did the trap appear upon the ground as compared with the drawing which Mr. Hill has made on this exhibit "D"? A. Appears the same.

Q. Did you do any sounding out there at that date, Captain? A. No, sir.

Q. You didn't do any soundings at all. Was it at this time on the 10th, the first time you had seen this trap that Alexander put in there?

A. Yes, sir. This is the first time I had noticed it particularly. [387]

Q. This was the first time you had noticed it particularly? A. Yes, sir.

Q. Now, while you was there you noticed the contour of the shore and the hills, and so forth, on the adjoining upland and took in a general—just a general view of the surroundings, did you not, Captain?

A. Yes, sir.

Q. Well, now, I will ask you, Captain, as to whether or not in your judgment that this trap the way it was built and constructed out—you was out there on the 10th or 11th—and further taking into consideration if they had a cable strung from the last pile nearest the shore on to—attached to some-

(Testimony of E. Thornton.)

thing beyond the line of ordinary high tide or say between the line of ordinary high tide and the low tide, would that fact that the cable or web strung on that and then with the trap constructed the way it was when you were out there on the 10th or 11th of this month, as to whether or not that obstructs the ingress and egress to and from Barron's upland?

A. Closes it, in my estimation.

Q. Closes it in your estimation. Now, I wish you would explain to the Court somewhat why that this would cut off the access to Barron's land.

A. Well, I wouldn't be able to go in to an anchorage.

Q. Now, I will ask you from what you know of that land in there and the surroundings as to whether you consider the proper place and sensible, feasible place for going in and out to Barron's land from Chatham Straits with any size of steamers or gasoline boats, just indicate on this plat to the Court?

A. Will you ask that again? [388]

Q. Well, just from—I withdraw the question. Knowing the little harbor as you do and Barron's upland, to indicate on this map—and the fish-trap and having been in there and as a navigating man, I want you to state to the Court what is the proper and feasible and sensible way of ingress and egress to and from Barron's upland to deep water?

Mr. CHENEY.—Now, just a moment. I would like to know whether you are confining this question to your prolonged lines here within these lines, or are you asking it without reference to these lines

(Testimony of E. Thornton.)

or not; coming in this direction, or this direction, or any direction to this survey?

Mr. WINN.—Well, I have the question there, your Honor.

Mr. CHENEY.—I will have to cross-examine him on it.

COURT.—He may answer the question, if the Captain understands it.

A. If I was coming from the south, come in about here.

Q. (By Mr. WINN.) Well, now, come in about where you would strike the trap? A. Yes, sir.

Q. About at the point called "Barron's piles," that is if coming in from the south?

A. Yes, sir. If I was coming in from the north I would circle around and probably come in about the same place.

Q. You have anchored vessels in there, haven't you, Captain? A. Yes, sir.

Q. Where did you find the best place for anchoring a vessel?

A. That I can't answer, been so long ago.

Q. I see. You didn't take any soundings when you was over there this last time in that regard?

A. No, sir.

Q. And you didn't take any depth of water? [339] A. No, sir.

Q. I see. Now, your explanation of getting in and out to the harbor is given not accurately—the condition of the bottom underneath the water, but

(Testimony of E. Thornton.)

it is based upon what, Captain?

A. Upon the general appearances of the surroundings and of the land.

Q. Yes. Just a minute. I will ask you, Captain, from what winds is that place in front of Barron's property there protected?

A. Well, I know it is protected from the northerly winds and there has been some talk about other winds, the east and the west and the northwest and the northeast, but it has been my—according to my observation it is a protection from the east to the west winds. They all draw down the channel.

Q. That is, it is protected from the east to the—what did you say?

A. The east to the west. I have noticed all those winds. No matter what they are, no matter what they call them, there is just two character of winds: one that draws up the channel; and one that draws down.

Q. What would you say about the practicability of a steamer like the "Anna Barron"—you have seen her, haven't you? A. Yes, sir.

Q. Going into this place to anchor, provided she had a tow of something and was endeavoring to reach the upland of Barron's property, say she had a tow of lumber, or anything of that kind, what would you say as to whether or not she could get into safe anchorage? What have you got to say about that? [390]

A. Well, there is no anchorage there for her with that trap in the way.

(Testimony of E. Thornton.)

Q. Captain, have you had any experience in going into places somewhat like the surroundings of this place at even-tide or night and had occasion to observe as to whether or not you could see a fish-trap any distance off?

A. I have that experience every trip to Sitka.

Q. Yes, sir. Well, what would you say from the surrounding country here and the way this fish-trap is located about the question as to whether or not when you would be going in there, say it isn't a moonlight night, but just an ordinary night, as to whether or not you could see this trap for any distance off?

A. Couldn't see it at all; not at some distance; you couldn't see that trap for ten feet, I don't believe.

Q. Is that one of the matters also that you take into consideration about this trap shutting off the right of way up to Barron's land?

A. No, sir; I think that trap is in the way even in the daylight.

Q. In daylight?      A. Yes, sir.

Q. But I mean you do take into consideration the—the inability to see an object of that kind with all the other circumstances in stating that it does cut off access to this land?      A. Yes, sir.

Q. You take all those into consideration?

A. Yes, sir.

Mr. WINN.—You may cross-examine, Mr. Cheney. [391]



(Testimony of E. Thornton.)

Cross-examination.

Q. (By Mr. CHENEY.) I understand you to say, Captain, that you haven't made any soundings out here in front of this survey? A. No, sir.

Q. You haven't tested the bottom in here to the eastward of the trap? A. No, sir.

Q. Or to the westward of the trap? A. No, sir.

Q. And during all your trips to Sitka for the last year we will say since this trap was built a year ago you never noticed the trap until the other day when you went out?

A. No, sir; will you allow me to explain?

Q. Yes, sir.

A. My regular route is not past that trap, but if you will show me that other chart I will show you how and why I have seen it. Why and why I am acquainted with the conditions down there in northerly weather.

Q. But I want to find out just what you testified to. I understood you to say that when you was out there the 10th of this month was the first time you had seen the trap? A. Yes, sir.

Q. Then, the route that you take in going to Sitka is too far away to observe the trap?

A. I don't go that way on my regular way to Sitka eastward. If you would allow me to explain, I would tell you.

Q. Which chart do you want? This one?

A. Yes, sir.

COURT.—Explain if you wish to, Captain.

A. Well, I just want to clear up the reason why

(Testimony of E. Thornton.)

in coming out [392] of—I am compelled to enter Funter Bay to deliver the mail there. If have northerly winds with a heavy sea, I don't ever cross the channel in the trough of the sea. For that reason and for years I have been running down here in very heavy northerly weather and by that means I get a little angle and get the sea on the starboard bow and make better weather of it and run up here, where ordinarily I would come down here. I have been in the habit of going down there for years to escape crossing the channel in the trough of the sea.

Q. (By Mr. CHENEY.) But still although you have gone that way you have never seen this trap until the 10th?

A. I haven't been down here for a year. I was asked last year. Last summer—this last winter there has really been no weather this season that required running down there that I know of. I haven't been down there. I don't think the vessel has been down there this year, and previous years I have been there at that just when the weather forced me I have been going down that way and crossing in that way.

Q. Since that trap was built you wouldn't have had occasion?

A. I don't know when it was built.

Q. Built a year ago.

A. I haven't been down there since a year ago; no, sir.

Q. Now, when you stated in answer to Judge Winn's question that it would be impossible for the

(Testimony of E. Thornton.)

—for you to run in there, that you wouldn't have any anchorage if you were going to reach the upland, where are you answering that—with reference to these side lines that are prolonged in front of his survey?     A. No, sir.

Q. You are not? [393]     A. No, sir.

Q. You say you haven't made soundings in this water at all?     A. No, sir.

Q. Well, then, I will ask you, Captain, supposing that you had a load of—a load of passengers, we will say prospectors that were going to examine a prospect over there and they wanted—they had some provisions and they wanted to land it anywhere on this low beach over on the east end of this claim over here—     A. Yes.

Q. —near that point and you were coming in for that purpose to lower a small boat and land your passengers and what freight they had, do you mean to say, do you mean to tell the Court it wouldn't be possible for you to come in here from Chatham Straits and land with her within a reasonable distance and lower a small boat and deposit your men and provisions there?

A. In what kind of weather?

Q. Well, we will say in good weather?

A. Oh, I could stand off for that matter and not drop an anchor; send my boat ashore without dropping any anchor, stand off in the channel.

Q. And you could land your passengers and also what freight they had in a small boat?

A. If the weather was calm I could send my boat

(Testimony of E. Thornton.)

ashore without anchoring.

Q. Well, now, Captain, if there was a heavy southeaster blowing? A. Yes.

Q. A heavy southeaster. Now mind you, you wouldn't think of going in there anywhere else along in there and anchoring in a southeaster? [394]

A. With that trap there?

Q. Or without it there.

A. If there was a heavy southeaster blowing—I don't know all the conditions of that place in a heavy southeaster; that I couldn't answer definitely.

Q. But you don't claim it is a protected harbor for a southeaster? A. Well, I say I don't know.

Q. You wouldn't want to offer an opinion on that?

A. No, sir; I don't; not having seen the place in a heavy southeaster I couldn't say.

Q. Then, not having seen this bottom in here, Captain, in front of the east half of survey 804, of course, you can't swear now to the Court that you couldn't anchor in that ground there?

A. I couldn't say I could or I couldn't say I would. I couldn't say either one.

Q. East of the trap. You wouldn't say you could or you wouldn't say you couldn't, do you?

A. No, sir.

Q. That isn't in your opinion, Captain, a good harbor, is it?

A. I consider it a fair harbor in any wind that blows down Chatham Straits.

Q. Northerly wind would you call it a good harbor?

(Testimony of E. Thornton.)

A. Either easterly, or as I said before any winds that draw down Chatham Straits I consider it a good harbor.

Q. Well, in the summer time, Captain, during the fishing season, say in June, July, and August, what are the prevailing winds over in Chatham Straits?

A. Southeasterly, I believe.

Q. Southeasterly winds? A. Yes. [395]

Q. And the northerly winds when do they generally occur—winter months?

A. Well, they generally start in, I believe, as far as I can remember, in September.

Q. Well, when, if you know, is the usual time for the southeasters, or is there any time?

A. Well, there is.

Q. They are liable to come any time?

A. There is no rule for that; no, that blows at any old time; is never calm.

COURT.—Any further cross-examination?

Mr. JENNINGS.—Only to put one question.

Q. Captain, I put this pointer on the word “low,” which is supposed to be on the beach there at low tide—I say the line of low tide, see that?

A. Yes, sir.

Q. Now, if a wharf were built from the point “low” and out to that place where I now have the pointer, which is Alexander’s trap, the—

COURT.—The southeasterly.

Q. (By Mr. JENNINGS.) —the southeasterly portion of Alexander’s trap, would the “Georgia” or any other boat have any trouble in going up there



(Testimony of E. Thornton.)

and discharging freight and passengers on this wharf?     A. Here.

Q. All right.

A. If the wharf—if the wharf—if this part of the trap takes the place of the wharf, is that what you mean?

Q. Well, yes. If the southeasterly, the southeasterly quadrangle of that trap now was a wharf instead of a fish-trap and the approach to the wharf ran on from that on back to [396] what—what is marked “low” there, that way, would there be any trouble of the “Georgia” landing its freight and landing passengers?     A. Right here, you mean?

Q. Yes.

A. Any vessel could come—a vessel could come here if this quadrangle was, you say a dock?

Q. Instead of a trap.

A. Instead of a trap. Why, in fair, ordinary—ordinary weather a vessel could discharge there.

Q. There would be nothing in this—nothing to make it any harder to discharge there than there is at the Haines wharf, at the Haines wharf or any other wharf in southeastern Alaska, would there?

A. No; I see no reason if this quadrangle was a wharf. I see no reason why a vessel couldn't discharge there.

Q. And if that southeasterly quadrangle there now were here just remove the quadrangle towards the west a little farther out toward the west be just the same?     A. This side?

Q. No, toward the west; this is the west?

(Testimony of E. Thornton.)

A. About how far?

Q. Well, we will say to the point that is marked 37 feet.

A. No; I see no reason why a vessel couldn't come in there and discharge.

Q. Wouldn't have to anchor. Just get up to the wharf, of course?

A. Of course, a vessel—a wharf being out this far, but more or less of a swell. That wouldn't be protected as much as a wharf in here. [397]

Q. Yes, that is true.

A. You understand that.

Q. But in the business of steamboating up here have to land at all kinds of places. Don't get stone piers to land at. Don't have them up here. You have made many a landing with the "Georgia" at places a good deal worse than that, haven't you, Captain?

A. Well, that I couldn't say. That is only supposition.

Q. Tell me now what would make that any worse than any other wharf to land at?

A. Nothing, as I said before, if this quadrangle was—

Q. A wharf.

A. —the square was—was a dock, I could come in there and discharge and even if it was here.

Q. And even if it was at the point 37?

A. Yes.

Q. That is all.

Mr. WINN.—Is that all the questions?

(Testimony of E. Thornton.)

Mr. JENNINGS.—That is all.

Redirect Examination.

Q. (By Mr. WINN.) Now, Captain, from what you saw of that and know of this little cove out there in front of Barron's property would it, in your judgment, be possible to maintain a wharf in there so that you could have ingress and egress to and from that wharf to the upland of Barron's with this fish-trap there constructed the way it is?

A. No, sir; I certainly wouldn't take a vessel inside of that fish-trap.

Q. Now, I wish you would explain to the Court, Captain, why you wouldn't? Mr. Jennings and Mr. Cheney didn't ask you, [398] and I will ask you to explain it.

A. There is not room to handle a vessel. Can go in here, but she never could turn around. Now, they have got these soundings around in here and to look at it, a person—and the measurements they have made, a person would think that you have all of that swinging room for a vessel to turn in, but you haven't. You have got to take a—you have got to take a certain amount for safety. You are only judging by the eye. There is no—there is no visible line to mark your danger line around here. You have only got to judge that, and you have got to judge that on your way, and you have got to contract the distance to be safe, and you haven't got room to turn, when you do that. When you go in here, you have got to get out. You have got to make a half circle to do it. They have talked of it, but I think any person who has

(Testimony of E. Thornton.)

been on a vessel any time knows you haven't got control of the vessel when she backs.

Q. Well, suppose, Captain, now, just look at this map you were testifying to then, consider if this line between this trap and the peninsula,—now suppose you were confined to that distance, to the prolongation of the westerly end line of the survey and the line made by the trap and the lead and confine yourself just to that space in there, would it be better or worse than you have described?

A. I can't. That is on to that, Judge?

Q. Well, I supposed when you was answering my question a while ago you was taking into consideration, you was using all this space.

A. I was using all this space. I wasn't taking into consideration any arbitrary lines here at all.

Q. But if you did take into consideration the lead of the trap [399] and the prolongation of the westerly end line of the claim and only considered that space in there, make it worse or better?

A. Make it worse, of course.

Q. Well, now, Captain, what about this—this space over on the other side of the trap, on the right hand of the—of the harbor as you go in and on the right hand side of the trap as you go in, what, if anything, do you know about that?

A. I know nothing about it, Judge.

Q. In there. Well, now, what—what, in your judgment, from what you know of the harbor there, is the best part of the harbor to go in to reach Barron's property? Would it be to go in over the pot?

(Testimony of E. Thornton.)

A. I would go right through that trap.

Q. Right through the trap. So, I didn't ask you what direction, Captain, did you—did you—just withdraw that—were you out there the day Mr. Hill was out there making these soundings?

A. No, sir.

Q. Well, now, Captain, you have a tide-book there, showing the method of securing approximately about average tides and mean tides, and so forth. Now, I will ask you if on the 11th of March, last, if Mr. Hill and the other parties who measured the depth of the water at the last pile in the lead nearest the shore to be eight feet at low tide on the 11th of March. Now, I will ask you as to whether or not at any other season there would be a lower tide than on the 11th of March?

A. Yes, sir; at extreme tides there that would be about 7 feet plus these soundings less. [400]

Q. Less there. That would throw it—that would throw the depth of the water at that last pile if it is now eight feet—

A. Throw it less than one foot.

Q. Yes, less than one foot. Did you ever take any notice, Captain, of the tides, the way they are around this peninsula? A. No, sir.

Q. You didn't take any particular notice of the tides there?

A. No, sir; I know nothing about the currents there at all.

Mr. WINN.—That is all.



(Testimony of E. Thornton.)

Recross-examination.

Q. (By Mr. CHENEY.) Captain, you don't agree with Captain Mason and Mr. Lloyd Hill then as to the depth of the water at that last lead pile?

A. I don't know.

Q. They both testified there would be at least two feet of water at extreme low tide.

A. I took the soundings there, eight feet.

Q. Just going by these figures Judge Winn stated to you?

A. And I know—I know that the extreme tides was seven feet—plus less than the soundings of that day.

Q. And if that eight feet was measured there an hour before low tide that would make some difference, wouldn't it? A. Yes, sir; a very little.

Q. Instead of being measured at low tide, as Judge Winn stated, it was measured an hour before the tide was low?

A. The time he measured within less than an hour I don't suppose make over six inches difference.

Q. You think then if that measurement is right that Captain Mason is not correct when he states that at extreme low [401] tides, speaking of June tides, there would still be two feet of water?

Mr. WINN.—Now, wait, Captain Mason didn't answer the question that way.

COURT.—Doesn't make any difference whether he did or not.

Mr. CHENEY.—I withdraw the question. That is all.

(Testimony of E. Thornton.)

Q. (By Mr. JENNINGS.) Captain, just one question. Do you often run up on pile-drivers without knowing it? You wouldn't do it if there was a light on a pile-driver, would you? A. No, sir.

Q. See a light there, know something was there?

A. If there was a light there, certainly.

Q. If it was an obstruction to navigation there is a regulation of the Treasury Department requires lights to be placed on all obstructions?

A. Well, possibly. I don't remember seeing that. I know there is.

Q. You know that is the custom?

A. It is the custom; yes.

Mr. JENNINGS.—That is all.

Re-redirect Examination.

Q. (By Mr. WINN.) If this trap out where it is located, Captain, is not generally an obstruction to Chatham Straits, only obstructs navigation when you want to go into the upland, that is all?

A. Yes, sir.

Q. (By Mr. JENNINGS.) That is the only time when you run upon that trap?

A. When seeking a harbor. [402]

Q. Going into that harbor?

A. Certainly; no obstruction at all going up and down Chatham Straits, but in going into the harbor it is.

Mr. JENNINGS.—That is all.

COURT.—That is all, Captain. Call your next witness, gentlemen.

Mr. WINN.—Mr. Carlson. [403]

[Testimony of Charles Carlson, for Plaintiff.]

CHARLES CARLSON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) What business are you engaged in?

A. Pilot of the steamer "Georgia."

Q. Pilot of the steamer "Georgia." How long have you been around the waters of southeastern Alaska on steamers, Mr. Carlson?

A. For the last twelve years.

Q. For the last twelve years? A. Yes.

Q. You have been on a good many steamers as pilot and otherwise, have you? A. Yes, sir.

Q. And when Captain Thornton is laid off here you have taken charge of the "Georgia" on her trips to Sitka? A. Yes, sir.

Q. Skagway, and so on. Now, you are with Captain Thornton on the "Georgia" now?

A. Yes, sir.

Q. Now, in this trip between Juneau and Sitka made by the "Georgia," has been made for several years last past, over what length of time have you been on the "Georgia" while she has been running on that trip?

A. I have been on her a little over five years.

Q. You have heard the testimony of Captain Thornton and the rest of these witnesses about this little cove on—on the westerly side of Admiralty Island just below Funter Bay? You have been along that coast, have you, Mr. Carlson? [404]

(Testimony of Charles Carlson.)

A. Yes, sir.

Q. How many times were you ever in that little place in front of this land that is claimed by Mr. Barron?     A. Only been there once.

Q. Only there once?

A. I have been by there lots of times.

Q. You have never been in there but once?

A. Only stopped there once.

Q. You noticed the place in passing up and down the shore there at times but never been in?

A. Yes, sir.

Q. Now, when was it you went over there, Mr. Carlson?     A. The 10th of March.

Q. The 10th of March you went over there at the request of Mr. Barron and went over with Captain Thornton?     A. Yes, sir.

Q. You examined as to the effect, in your judgment, this fish-trap of Alexander's had in getting on to Barron's land from that harbor?     A. Yes, sir.

Q. Well, now, you was out there at this date and saw the way the trap was constructed, did you, Mr. Carlson?     A. Yes, sir.

Q. Well, now, taking into consideration the way it was constructed at that time, Mr. Carlson, and your observations and the surroundings there in the harbor, I will ask you if that trap would be an obstruction in the way of entering into the land of Barron's just above there from the deep water of Chatham Straits? Would it be an obstruction in the way of free ingress or free egress to and from the water of Chatham Straits to Barron's piece of land

(Testimony of Charles Carlson.)

on which the [405] cabin is on?

A. For a steamboat, it would, sure.

Q. A steamboat of what size?

A. Well, take a boat the size of the "Anna Barron" or the steamer "Georgia" would be in the way because you get in there you couldn't turn around.

Q. You went out especially for the purpose to observe the way that trap was built, and so on?

A. Yes, sir.

Mr. WINN.—You may cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Carlson, if you were going to land some passengers and some provisions, we will say some prospectors that wanted to get off there on that beach and they wanted to land in here, on this east end of this claim, and you were going to land them there, would there be any difficulty in running the "Georgia" up here if fair weather and coming out at anchor and putting the people out with their provisions on the east end of that claim? A. I guess all right.

COURT.—You haven't designated the place.

Mr. CHENEY.—I said in front of the east end of the claim.

Q. What would you say, Mr. Carlson?

A. I guess that would be all right. All depend upon how far they wanted their stuff. Of course, if wanted it up in the bight.

Q. That would be different if they wanted it over here? A. Yes.

Q. Now, isn't it a fact, Mr. Carlson, that you have



(Testimony of Charles Carlson.)

answered Judge Winn's questions with the idea in mind of the inquiry [406] that if wants to come up here to what they call this sandy beach there, towards the west end of this survey? A. Yes, sir.

Q. That is what you had in mind when you answered the question?

A. Well, I expect that was right.

Q. Yes; but leaving that aside for the present, now, I am just asking you about the east side of the claim. Suppose you wanted to come in there. You say you don't know any reason why couldn't come in and land the passengers there and send them ashore?

A. Couldn't go very close to the shore because the day we was out showed a reef sticking out there—may be several.

Q. You wouldn't want to run up on the beach against this? A. Lay off a long way.

Q. You would want to lay off her where the water was deep? A. Yes.

Q. Out here near the—say, somewhere midway between the extension of this lead line of Alexander's trap and this X that Captain Mason put out on here, he said it was deep water? A. Yes.

Q. You don't know of anything to prevent you from doing that? A. No.

Q. You say you went out there to observe this survey, Mr. Carlson? A. Yes, sir.

Q. Well, do you know whether it is true as Captain Mason says that on the east end of this claim here there is a high bluff running within a few feet of the east line of this claim? Whether that is a

(Testimony of Charles Carlson.)

high bluff running on towards there?

A. Well, there is a bluff all right; pretty steep, I don't know—I didn't take notice exactly how close it was to the line but it is pretty close anyway. [407]

Q. Didn't take any particular notice of it while you was out there? A. No, sir.

Q. Would you say that bluff—that goes to ordinary high tide or is it quite a ways between?

A. That is what, if I remember right, it comes down to high tide.

Q. Well, now, as a matter of fact, Mr. Carlson, you didn't—you didn't go and locate this claim and determine this corner, corner number 3 of that survey?

A. No; but I could see the sign they had.

Q. Where? A. On the beach.

Q. What sign?

A. Where they had a tree blazed.

Q. Had what?

A. Had a tree blazed for a corner post.

Q. And some one showed you that east corner?

A. Yes, sir.

Q. Did they. But you didn't go on up over this ground here yourself? A. No, sir.

Q. On the east end of the claim? A. No, sir.

Q. And you haven't made soundings out in front of the east end of the claim; know what the bottom is? A. No.

Mr. CHENEY.—That is all.

Q. (By Mr. JENNINGS.) Mr. Carlson, just now considering that the fish-trap is there and you have

(Testimony of Charles Carlson.)

got some passengers on [408] the "Georgia" to land, to go to this claim, if there was no wharf there you would land at, you would go to the east end of the claim and land them in a small boat, wouldn't you?     A. I guess I would, I think.

Q. If there was a wharf beginning at the point, running here and extending out there to where the fish-trap is and between, say, the point marked "37 feet" and the extreme west end of the claim, if there was a wharf running from "low," the word "low" to it, Mr. Carlson, you would—you would put the "Georgia" up against the wharf and land them on the wharf, wouldn't you?

A. Yes, sir; I would if run out as far as that, but if run out half way I wouldn't go in there.

Q. No; but then you wouldn't care to go to a wharf, that the face of the wharf between 37—at that point marked "37 feet" and the southeastern end of the trap, if that was the wharf, you wouldn't care to go there and land your passengers?     A. No.

Q. And if there wasn't any wharf and wanted to get there you would land them over here on the east side?     A. Yes, sir.

#### Redirect Examination.

Q. (By Mr. WINN.) Well, now, let me ask you, Mr. Carlson, they asked you about you would anchor off on this east end. Do you know whether any anchorage on this side?     A. No, sir; I don't know.

Q. You don't know a thing about it?

A. Have nothing anchored there and further south of it.

(Testimony of Charles Carlson.)

Q. Of course, if no anchorage there, couldn't anchor there? A. No. [409]

Q. Now, Mr. Carlson, suppose we take into consideration the water immediately in front of these two lines of Mr. Barron's claim prolonged, I will ask you if, in your judgment, that it is possible to, within any degree of accessibility to the wharf, to maintain a wharf out from Mr. Barron's land anywhere in there with that fish-trap the way it is?

A. That I couldn't say exactly because I haven't examined the ground and I should think that a fellow want to build a wharf want to examine the ground, bottom. Of course, he can build a wharf out as far as the trap, I should think.

Q. You think could build it as far as the trap out here, if that was possible?

Mr. JENNINGS.—The trap isn't out here where you are pointing.

Q. (By Mr. WINN.) Well, to where, near it, out beyond this point. Now, I will ask you, Mr. Carlson, you know Chatham Straits well? A. Yes, sir.

Q. Now, knowing what, from what you know about wharves and docks, if you were going to build a wharf out, you wouldn't run the face of the wharf clear out into Chatham Straits beyond that point or beyond that reef?

A. No, I don't think would be very safe.

Q. No; the sheltered part of that harbor is after you get inside?

A. Yes, sir; that is what I always considered.

Q. Yes, sir. Now, taking that into consideration,

(Testimony of Charles Carlson.)

I will ask you this question, Mr. Carlson: I believe it is 172 feet from where this end, this lead line if extended would intersect the lower boundary line of Barron's claim is 172 feet from there out to the end of Barron's claim. Now, let's take just for the sake of the question and say this is—that this end in there is good ground, that you can [410] drive a wharf in there and say there wasn't any bluff there, now do you think as a navigator that in that 172 feet that it would be practicable and a feasible thing to do to build a wharf there and then go in there out to that wharf with that fish-trap built there the way it is?

A. Well, it wouldn't be so handy as it would if the trap was out of there.

Q. Well, now, in the night-time or in stormy weather if you wanted to come into a wharf there with that trap, it would then be practicable to do so?

A. Going into the wharf?

Q. Yes, sir.      A. No.

Q. Would not. Have you had any experience about running up on these traps at night-time, Mr. Carlson?      A. Yes; a few times.

Q. It is pretty hard to see them when as close in to the shore as this trap?

A. Yes; can't see them very well, but, of course, I never was in the cannery business or in the service of cannery boats, so I don't know exactly how you act, but several times we have had occasion to run close to them with the other boats. You can't see them before you are right up alongside of them.

Q. You know even in the case of a wharf where in



(Testimony of Charles Carlson.)

the shadow of the hill or mountain in the night-time, unless a moon-light night, it is pretty hard to make out the outlines of the wharf, don't you, Mr. Carlson?

A. Yes, sir.

Q. Now, that trap in there, the condition it is, would it be a menace or a nuisance in the way of getting in and out to [411] Barron's property any time in the night time with a steamer?

A. Of course, if you wanted to get inside of her, on the northern side, couldn't hardly get in there; couldn't very well do it.

Q. But this side of it, on this other side, you said you didn't know anything about it?

A. No.

Q. But suppose you just had that 172 feet left in there and had to build a wharf there, had to get in and out from that place, either coming up or down, would that trap furnish an obstruction in the way?

A. Oh, yes; certainly would both to some extent.

Mr. WINN.—That is all.

Recross-examination.

Q. (By Mr. CHENEY.) Wouldn't bother you any, Mr. Carlson, if you come from an easterly direction and just run out right up alongside the wharf and the wharf was clear out here, near this prolonged line, wouldn't bother you to land at the wharf because the trap was away over here, 500 feet away, would it?

A. So close to the wharf bound to be more or less bother. For instance, if the boats go in there and back out—all boats back to the port—and you have to provide for that when you go in there and have

(Testimony of Charles Carlson.)

to work to get out.

Q. If you went in and backed out. But suppose you didn't back out. Suppose we say there is a wharf running out here 400 feet in front of the east end of this survey and you come in from this direction—we will suppose it is deep enough water for you to come in, going to put out a party, and you land there at that wharf and this is all open water. [412] You are not confined to that line with my question. No line there; that is simply an imaginary line any way.

A. I understand.

Q. Now, this is all open water of Chatham Straits. You wouldn't have to back out over that if deep water there?

Mr. WINN.—I would object.

A. Certainly have to back out.

COURT.—Objection overruled.

Mr. WINN.—Exception.

Q. (By Mr. CHENEY.) Why, couldn't you turn around?

A. Couldn't turn around. There is shore over on that side.

Q. That is, say, up here? A. Yes, sir.

Q. You don't run—you don't understand that map to be land here?

A. Well, if you come up to the wharf north or south you come into it with the bow on. Don't come in with the stern on, and consequently have to back out. You won't have room to go ahead. You have to back out.

Q. Well, you wouldn't. There isn't nothing to back out or there isn't any land down here. It is all

(Testimony of Charles Carlson.)

open water. Suppose it is all open water, twenty fathoms here and say ten fathoms where this mark is made, Mr. Carlson, and the wharf comes out, we will say, to here, midway between that land there and this line and you are coming in from this direction there to land at that wharf, you don't mean to say you have got to back clear out into Chatham Straits?

A. Well, no; if the wharf was run out so far as that you would have room enough to go inside the wharf and turn around. Any wharf of that kind generally have to back away from it. [413]

Q. That is true of any wharf in the states. Something would apply to any wharf in the states?

A. The majority of wharves have to back out.

Q. What is that?

A. The majority of wharves have to back out.

Q. Why, Mr. Carlson, that is the same case with most of the wharves in the states? A. Yes, sir.

Q. You land up there at the wharf at Haines and land alongside of it with that—like that little boat does from Skagway, you have to get out by backing out? A. Yes, sir.

Re-redirect Examination.

Q. (By Mr. WINN.) Where is the protected part of that harbor, the protected part of it, near this peninsula? Would that be the place to build your wharf or the place Mr. Cheney was talking about?

A. The only protected place I saw, I should judge protected harbor is, according to my experience, is right about where that X is marked.

Q. Where the cross is marked upon the left hand

(Testimony of Charles Carlson.)

side of the line of piles as you go in. You consider that part as the protected part.

A. Yes; get a protection from the north wind from this peninsula and, of course, if outside the peninsula don't get no protection

Mr. WINN.—That is all.

COURT.—Anything else, gentlemen? That is all, Mr. Carlson.

Mr. WINN.—Call Mr. Alexander. [414]

**[Testimony of C. J. Alexander, for Plaintiff.]**

C. J. ALEXANDER, defendant, being duly called and sworn, testified as follows on behalf of plaintiff:

Direct Examination.

Mr. WINN.—I call Mr. Alexander, of course, as an adverse witness in this case, if your Honor please, being the defendant.

Mr. CHENEY.—You are not obliged to call him. No explanations are necessary.

Mr. WINN.—Yes, sir; I will take care of that, of course.

Q. Now, Mr. Alexander, you are the defendant in this case, aren't you? A. Yes, sir.

Q. You was a witness in this case on the motion for the dissolution of the temporary restraining order, weren't you? A. I was.

Q. Yes. You testified in that case?

A. Yes, sir.

Q. Now, Mr. Alexander, I will ask you if it isn't a fact—just withdraw that question. You are now acquainted with the boundary lines of U. S. Survey

(Testimony of C. J. Alexander.)

804, are you?      A. Yes, sir.

Q. You are better acquainted with them than you were upon the hearing to dissolve that temporary restraining order?      A. Much better acquainted.

Q. Much better acquainted. Now, I will ask you if you are also acquainted, Mr. Alexander, with the shore line along this claim or Mr. Barron's claim number 804?

A. Yes; I made it a point to make myself very familiar with the shore line of that claim.

Q. Yes, sir.      A. Yes, sir. [415]

Q. And you were quite familiar with it when you were examined upon the witness-stand on the motion for the dissolution of the temporary restraining order, were you not?

A. Yes, sir; quite familiar. I think I testified as much.

Q. Yes, sir. Now, I will ask you, Mr. Alexander, if it isn't a fact and I will refer you to Plaintiff's Exhibit "D" in this case that the most feasible place of reaching this claim of Barron's is the sandy beach just along the shore, near the words here "mean" and "high"?

A. Why, I wouldn't consider it the most feasible place. I never have any trouble in getting ashore along there any where. I don't see any difference.

Q. Didn't you testify, Mr. Alexander, on that motion for a dissolution of the temporary restraining order that the most feasible and practicable place, or substantially to that extent, to land on this upland was along this sandy beach just where I have indicated?



(Testimony of C. J. Alexander.)

Mr. JENNINGS.—Object to—

A. Well, I didn't—

Mr. JENNINGS.—Wait a moment. Object to it immaterial and irrelevant and an attempt to contradict his own witness and—well, it is immaterial and irrelevant as to what he testified on the former trial. If the Court please, he has produced him here now as his witness.

COURT.—I think under the statute he has a right to show that he testified to something different even if he is his own witness. I think you will find it there, Mr. Jennings, on page—

Mr. JENNINGS.—All right. I know, your Honor.

Mr. CHENEY.—He has to say he is taken by surprise.

Mr. JENNINGS.—I will withdraw the objection.  
[416]

COURT.—Go ahead.

Mr. CHENEY.—You have to state you are taken by surprise if you want to contradict your own witness.

COURT.—No, I think not under that statute. That is a very liberal statute.

Mr. JENNINGS.—We don't object.

WITNESS.—I have forgotten the question, Mr. Winn.

Q. (By Mr. WINN.) I will ask you if you didn't testify on the witness-stand while in court upon the hearing on that motion for a dissolution of the temporary restraining order that the sandy beach along

(Testimony of C. J. Alexander.)

here, what I call "mean" and "high," was the really feasible, practicable place and the natural place for entering upon Mr. Barron's property from the water,— A. Well—

Q. —or substantially to that effect, did you?

A. Well, I wouldn't commit myself, Mr. Winn. I wouldn't deny that, this question, for the reason that the preliminary hearing was a year ago and I was on the stand for three or four hours and was asked a great many questions. The lawyers put in that testimony and my mind is not clear on all the things. I wouldn't deny it.

Q. You wouldn't deny it? A. No.

Q. Well, Mr. Cheney has a copy of your testimony. He has had the transcript. You have had a chance to read it over?

A. I haven't taken notes to do it. Don't know what it is in that respect.

Q. You haven't read it over at all? A. No, sir.

Q. You wouldn't say to the Court though you didn't testify to [417] that upon that preliminary hearing?

A. No; I wouldn't lay myself liable in that way because I do not know.

Q. Now, Mr. Alexander, is it not a fact that the shore line extending out to the westward from this sandy beach that I have just referred to is rocky and hilly and somewhat precipitous?

A. You are talking about the westward and you are pointing to the eastward.

Q. Talking about this out—well, out to the east-

(Testimony of C. J. Alexander.)

ward?      A. Yes.

Q. Take it from the eastward then, isn't the shore line from the sandy beach out—clear out to the boundary line of Mr. Barron's claim rocky and hilly?

A. Positively not, that is, it is rocky. It is of a rocky formation, but it isn't this steep precipitous cliff as they described in their evidence. There is a low place on the easterly end of the claim, very similar to this on the westerly end, the end as described in this sandy beach here.

Q. Well, now, didn't you testify upon that hearing for the dissolution of that temporary restraining order when the following question was put to you in this manner, didn't you answer it as follows: "Q. On both sides of this little bay, it is rocky?" You answered: "Very rocky formation; yes, sir." Now, did you answer that question that way?

A. I think possibly I may have; yes, sir.

Q. Yes, sir. Now, then—

A. It is a fact I never—

Mr. CHENEY.—I just want to let him answer the question.

Mr. WINN.—He has answered the question.

COURT.—Oh, yes, Judge Winn, you are allowed the liberty [418] to call this man as your witness and then virtually cross-examine him. You must let him explain.

Mr. CHENEY.—I ask that he be allowed to explain as he stated he would. I ask that the witness be allowed to explain his answer.

COURT.—Yes.

(Testimony of C. J. Alexander.)

A. There is this sandy beach and this peninsula which runs out there and the point running out which forms that peninsula is a rocky formation, all rock, nothing but rock. There is a steep precipitous cliff inside of my trap or where my trap points, for that is all either side of this sandy beach described, then beyond the trap to the eastward again there is another low beach, very similar to that on the westerly end of the claim.

Mr. WINN.—Now, if your Honor please—

Mr. JENNINGS.—Just a moment.

Mr. WINN.—Just wait. I have the witness. I want to state I put to the witness an impeaching question, if the Court please—

Mr. JENNINGS.—Impeaching his own witness.

Mr. WINN.—That is just exactly what I am doing. Here is what I attempted, if your Honor please. I was up against the proposition the other day, against the same proposition. Mr. Rustgard impeached a witness. Now, here is what he did, he put that abstractly to the witness as an impeaching question. I said, “Didn’t you testify on the other trial and answer the following question: ‘On both sides of this little bay, it is rocky?’ and answer ‘Very rocky, formation; yes, sir.’ ” Now, he can either answer that by yes or no. [419]

COURT.—Yes, Judge Winn, he could, but let’s see what the Court is after. If the man has any explanation to make to that, I want to have it now for my own benefit, if not for his benefit. Now is the time. It might be overruled hereafter, and there is no abso-

(Testimony of C. J. Alexander.)

lutely no rule of evidence that prevents him from explaining. No, no; this is not unfair—no,—to have the evidence there before you that this man gives. Now, you are allowing to cross-examine. You are allowed even to impeach him, but certainly no rule of evidence ought to prevent him from having an opportunity to that.

Mr. WINN.—I don't *don't* that, but I think ought not be permitted when coming in—

COURT.—Explain right now, Judge.

Mr. WINN.—All right, I will take an exception to your Honor's ruling,—am putting it as an impeaching question; and I want to ask another question.

COURT.—The witness has a perfect right to explain impeaching questions even proved by you. It is only fair for him when asked categorically whether or not he did say so and so or so and so, he has a right to explain just what he meant and it goes to the Court or jury—this explanation—what he meant then.

Mr. JENNINGS.—If the Court please, my objection to this whole proceeding is simply this. Judge Winn apparently has not produced the witness to swear to something for his side of the case. He has produced the defendant here to see if he can't catch the defendant in some contradiction now, that is what this man denies or asserts. He is asking the witness not for the purpose of eliciting testimony to support his case in chief but he produces the witness, the defendant, on the witness-stand for the express purpose of [420] impeaching him. Now, that is what he did it for the express purpose of impeaching him,



(Testimony of C. J. Alexander.)

when the defendant is not a witness in the case yet at all, except so far as he has produced him. Of course, I admit that if a man, if a plaintiff or one party puts a witness on the stand and he is surprised by his testimony—he asks him a certain question—he is surprised by his testimony, when he can say he didn't understand so and so and such and such at such time. But what is the case here. For the difference here the case. Here is the plaintiff putting the defendant on the stand for the express purpose of trying to make him contradict himself; not for the enlightening of the Court or getting the facts in the case out, and that is what this means. It seems to me when it says that the party producing a witness may show that he has made some misstatements outside the court that lead him to believe he would give the same on the stand here.

COURT.—No, I think, Mr. Jennings, that a party may be called. Now, Judge Winn has asked this witness certain questions, other questions that he has asked his own witnesses. Now, whatever may be Judge Winn's purpose, the Court is dependent upon the good faith of counsel and so long as this witness is only asked questions that are germane—if he has made any contradictory statements elsewhere in this court or anywhere else, it is only competent his attention should be called to them and if that impeaches the testimony given here, the Court has a right to consider that. No, I think that line of examination is competent.

MR. CHENEY.—Just now, your Honor, before we

(Testimony of C. J. Alexander.)

proceed any further if you are ruling that way, I would ask that Judge Winn instead of asking the questions the way he has taken to [421] ask them and not telling him what he did swear to and only saying substantially, that he should put the direction question as testified according to the record if on that hearing you were asking that question, if you didn't say so and so in answering that question, and then give the witness a chance to answer and to explain.

COURT.—That is substantially what is being done, Mr. Cheney. [422]

Q. (By Mr. WINN.) Now, I will ask you, Mr. Alexander, if at the time of the preliminary hearing or rather the hearing to dissolve the preliminary injunction in this case, if you had completed your fish-trap at that time?

Mr. JENNINGS.—Object, incompetent and irrelevant.

Mr. CHENEY.—Isn't asking him anything.

Mr. WINN.—I want to find out the condition the trap was in at that time.

The COURT.—I don't think it is material what condition the trap was in at that time; I don't think that that is material at all.

Mr. WINN.—Take an exception, if your Honor please.

Q. Now, Mr. Alexander, have you—when you completed that trap—

Mr. JENNINGS.—Object, immaterial and irrelevant.

The COURT.—He may answer.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—The question isn't when it was completed—when.

COURT.—He may answer.

A. I completed it, as near as I can remember, well, a few days after the dissolution of this restraining order after the—right out from here after that time and proceeded to complete it.

Q. (By Mr. WINN.) O, yes; what did you do after the dissolution of that restraining order to complete the trap?

Mr. JENNINGS.—Object to, immaterial and irrelevant.

COURT.—No, he may answer that question.

A. The first thing I did was to drive an additional eight piles, Judge, I think. I claim it would make, after that, the trap regular, it being complete, which formed and made a complete trap, making a pot, heart and lead, which is a complete fish-trap.

Q. That is what you call a complete fish-trap, is it?

A. Yes, sir, a complete fish-trap is a back or pot, heart and lead.

Q. Where did you get that definition?

Mr. JENNINGS.—Objection.

COURT.—Yes, that isn't necessary. [423]

Q. (By Mr. WINN.) Well, you don't consider that lead to the fish-trap any part of the fish-trap?

A. That is one of the parts I have mentioned,—the pot or back, heart and lead constitute a fish-trap.

Q. Now, you know the condition that fish-trap is in at present, don't you? A. Well, I know—

Q. When were you out there last?

(Testimony of C. J. Alexander.)

A. I was out there within a week or ten days ago.

Q. Yes. Well, you heard the testimony of Mr. Hill, didn't you, in court, and several other witnesses?

A. I have heard all the testimony that has been given in this case; yes, sir.

Mr. CHENEY.—Just a moment, Judge Winn. I suppose it is understood in regard to that if counsel cross-examines him now he is not allowed to cross-examine him again on the same question when we put him on, that would make this record ten thousand miles long.

COURT.—For you to determine that.

Mr. WINN.—I didn't know whether you was going to put him on; that was what I was afraid of.

COURT.—Well, proceed.

Q. (By Mr. WINN.) Now, then, Mr. Alexander, I simply want to know when you stated to the Court—when you say that you completed that fish-trap what time you completed it?

Mr. CHENEY.—Object, that is repetition. Same question you asked him.

COURT.—Objection overruled.

A. Well, I gave that to you. I have testified that I finished this trap all up, as I say, it was somewhere sometime after the dissolution of this restraining order.

Q. (By Mr. WINN.) And you went out there after the dissolution of the restraining order and only put eight piles there to [424] complete it?

A. Oh, no; I did not. I put more piles there.

Q. How many did you put there?

(Testimony of C. J. Alexander.)

A. I put eight piles in to complete it.

Q. Then, what did you do with the lead. What did you do with the lead. Did you drive any more piles than that? A. I certainly did.

Q. How many?

A. Well, fourteen or fifteen, perhaps.

Q. Extended out how many feet towards the shore?

A. Well, I would say two hundred feet or more.

Q. Then, at the time of the dissolution of that temporary restraining order, your trap wasn't complete, was it? A. Completed all—

Mr. JENNINGS.—Objection, incompetent, irrelevant and immaterial.

COURT.—He may answer.

A. — but the eight piles in this heart, it was a complete trap; yes, sir.

Q. (By Judge WINN.) Now, you say it was a complete trap without the eight additional piles attached and you defined a fish-trap a short while ago as being constituted of a lead and several other portions? A. Yes, sir.

Q. Now, then, do you want the Court to understand that your fish-trap was just as complete on the day of the dissolution of that temporary restraining order as it was after you put those fifteen or sixteen piles in the lead?

Mr. JENNINGS.—Object, immaterial and irrelevant. Just as complete is different from being completed; he said being a complete trap.

Mr. WINN.—I suggest the witness is not an adverse witness.



(Testimony of C. J. Alexander.)

Mr. JENNINGS.—No suggestion to the witness, Judge Winn. [425]

COURT.—No, I don't think, Judge, it is at all material to this, and don't make any difference whether he completed it, how much he had to do to it. The question is, what is there now?

Q. (By Mr. WINN.) I will ask you, Mr. Alexander, if this question wasn't put to you upon the hearing on the motion to dissolve that temporary restraining order: "Now, I will ask you if the trap is complete as it stands now so far as the location is concerned with reference to the tide land?" That is answered: "Yes, sir." Too, that is, I mean you answered, "It is complete." Now, was it a complete trap just as it is now and just as it was in the middle of last April as it was when you testified on that motion for a preliminary hearing. I want to get at what you consider a complete trap?

A. It was just as—

Mr. JENNINGS.—Wait a minute. Object to that, incompetent and immaterial and irrelevant.

COURT.—I don't see as it makes any difference, Judge Winn, when this man completed his trap or when he thought he completed it. You are asking for an injunction here, contending that he is blocking your right of way. Now, the question the Court is to determine is: what is there now and *does what is there now* interfere with your passage way. Now, what he may have thought about a trap is certainly not your case in chief.

Mr. WINN.—Well, if your Honor please, I don't

(Testimony of C. J. Alexander.)

want to tell the witness what I am leading up to you see. Just let me show some part of this witness' testimony here to get it.

COURT.—No way to get it in here. You can't call this man for the order—purpose of impeaching him—making him your witness to impeach him.

Mr. WINN.—I understand that.

COURT.—The thing is then to ask him something material if you want to impeach him, or ask him some material fact. [426] Don't take up time on questions that the Court has ruled are immaterial several times.

Mr. WINN.—Yes, sir, I will take an exception to your Honor's ruling.

COURT.—Yes, sir.

Q. (By Mr. WINN.) Now, I will ask you, Mr. Alexander, if it isn't a fact that you testified upon the hearing to dissolve the temporary restraining order that the reason your trap as it was then constructed did not obstruct Mr. Barron's going in and back and forth from deep water to his upland was for the reason that your lead did not extend any closer than about three hundred feet from the shore line, and that was the reason that you gave your trap didn't obstruct Mr. Barron's access to his upland?

Mr. CHENEY.—Now, just a moment.

Mr. WINN.—Your Honor can see the materiality of it.

Mr. CHENEY.—I thought it was understood with Judge Winn that he put fair questions to the witness and at least read the question and give him a chance to answer it.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—We object to that as immaterial and irrelevant.

COURT.—The only way it would be material is this, Mr. Jennings; it is probably a little out of order, but if he did not ask the witness in the first place whether or not the trap as constructed now if that interferes with him and the witness had set no time he might ask him if he didn't testify to this on a former occasion. But I suppose it is only a matter of order. He may answer.

Mr. CHENEY.—Counsel has that question before his face; why can't he read this question before him?

WITNESS.—What was the question, Mr. Winn, please?

Q. (By Mr. WINN.) I will go back at it the way counsel wants to. Probably it is the better way. Now, Mr. Alexander, you know [427] upon the hearing of that—to dissolve the temporary restraining order that the question that was being tried then was as to whether or not your structure as you had it then built obstructed the free ingress or egress in and to the property of Barron's from the deep water or not? You knew that was the question that was being tried? A. Yes, sir.

Q. Now, then, you at that time only had the portion of your fish-trap constructed that is indicated on this exhibit "D" that extends from what is marked upon here "Barron's piles" down to *this word* along here "Alexander's piles"—that is the only length of the trap that you had constructed at that time, wasn't it? A. Yes, sir.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—Object, incompetent, irrelevant and immaterial.

COURT.—He may answer.

Q. Now, then, since that time you had the piles put in that are indicated in black lines here that extend out toward the shore, didn't you?

A. Yes, sir, we admit those facts.

Q. Now, then, isn't it a fact, Mr. Alexander, that you testified on that application that the reason why that your trap as it was then constructed didn't interfere with boats going in and turning round and coming out up to Barron's property was because that your lead was somewhere two hundred and fifty or three hundred feet from the shore line?

Mr. JENNINGS.—Object to it, immaterial and irrelevant.

COURT.—He may answer.

A. Well, I don't remember that question asked, Mr. Winn, as it was put to me. I do remember a question that was asked me regarding the opening in there. I testified that, I do remember [428] that I could not drive the piles in any further.

Q. Yes? A. I remember that.

Q. Well, when did you find out that you could drive piles in any further? A. On—

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—I don't think that is material, Judge; as a matter of fact, I don't think any of it is material.

(Testimony of C. J. Alexander.)

Mr. WINN.—It is only the condition, if your Honor please.

COURT.—Now, Judge Winn, let us see. Let us understand each other. It doesn't make any difference what this man testified to on a former occasion as to whether or not this Court is going to give you an injunction or not, unless the evidence shows that you are interrupted. Now, if this man had come here and given his opinion that it wasn't at all cut off or I mean getting to the upland wasn't cut off by reason of your—by reason of his trap, then I say why it would be perfectly proper and competent for you to ask him these questions as to what he testified on the former occasion. But is that true? He hasn't been called as a witness. He hasn't yet testified that you were interrupting him—I mean he was interrupting you; whether he was cutting off your access or not. So it does seem to me that it is merely calling the man to the stand for the purpose and for no other purpose than impeaching him. That isn't competent at this time.

Mr. WINN.—The only thing I think would be, your Honor, would be this; it is true the way the pleadings are in this case that they have denied that they ever extended this line out to the beach. We allege that in the complaint that they did do it. [429]

COURT.—Yes.

Mr. WINN.—And that was one of the principal reasons why they were obstructing our way. They denied that. Now, then, I am calling this witness



(Testimony of C. J. Alexander.)

on the witness-stand, if your Honor please, either for impeachment or to prove my side of the case. Now, I ought to be able to show by him that they did extend this lead line out there according to my supplemental pleadings.

COURT.—Certainly, you can prove anything upon the ground, existed on the ground, isn't any question about that.

Mr. WINN.—I am getting at this other purpose. Maybe I have the cart before the horse, but it is this purpose I am contending for—that Mr. Alexander's testimony on the previous hearing was this: That the reason he wasn't interfering with this upland and the entrance to it, and so forth, was because he was three hundred feet away from here—

Mr. BURTON.—More than three hundred feet.

Mr. WINN.— —more than three hundred feet. Now, then, I am asking about the things that is in here and I am going to put the question to him as to whether or not his trap being built in the way it is in there doesn't interfere with the ingress and egress to this property.

COURT.—If that was gone into, Judge Winn, there might be some reason for trying to contradict him, but there isn't any reason at this time.

Q. (By Mr. WINN.) Then, I will ask that—now, I will ask you, Mr. Alexander, as to whether or not this trap as it is now completed, and when I say now I mean as you fixed it last season, by filling this out to connect with the upland—I will ask you if in your judgment that interferes with the ingress

(Testimony of C. J. Alexander.)

or egress to and from Barron's property to deep water with steamers or [430] gasoline boats?

A. Well, of course, the trap being situated in front of the claim there it covers a portion of the frontage of the claim without a doubt. We have it on paper, I think by laying a right angle, a right-angle triangle over the meander line on that claim on either side of the trap that it shows that we are covering an area of the face of the claim at average low-tide line of two hundred and thirty feet. By drawing a line from No. 1 to No. 2 corner of the claim and by bringing a right triangle on either side of the trap we are covering a frontage from the meander line of the claim out to deep—clear to the coast of Japan, if you please—of a distance of 270 feet.

Mr. CHENEY.—Let him get the answer in.

Mr. WINN.—Let him get away from the coast of Japan. No use of this witness getting foolish.

Mr. JENNINGS.—We want to get funny, too.

COURT.—Well, gentlemen, if counsel wouldn't talk so much we would get along a good deal faster. Proceed.

WITNESS.—I have answered the question, I think.

Q. (By Mr. WINN.) Now, you haven't answered the—I don't think I asked you this question as to whether or not that that trap built in the way you have it then take and connected up from your last pile in the lead, nearest the shore, on upland, by stretching web or wire there the way you had it stretched, as to whether or not that trap completed

(Testimony of C. J. Alexander.)

that way didn't interfere with the ingress and egress to and from Barron's upland?

Mr. JENNINGS.—Now, wait a minute. We object to that, if the Court please, because it is a conclusion of law. Is not whether that interferes, but whether it prevents.

COURT.—Well, that may be true, Mr. Jennings, but I want to ascertain how it prevents that, also the extent of the [431] interference. I think the question may be answered.

A. Why, if I were to answer it—answer that question with an unprejudiced opinion I would say that the trap is obstructing the access and egress to that portion of the claim which I have described here, east of the trap, covering the front of it; but in no way, as I can see, interferes with access or egress to either of the claim.

Mr. WINN.—Yes, that is your judgment?

A. Yes, sir.

Q. Now, then, Mr. Alexander, I will ask you if you wouldn't consider your fish-trap as complete before you put these additional piles in the lead line?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—Objection sustained. I think he has answered that any way, but it is not material.

Q. (By Mr. WINN.) Well, now, Mr. Alexander, isn't it a fact that on the previous hearing that you said that the reason your trap as then constructed there—you wouldn't have the fifteen or sixteen piles

(Testimony of C. J. Alexander.)

in the lead at that time—the reason it didn't interfere with the ingress and egress to and from this upland of Barron's was because that the end there of your lead was some five or six hundred feet from the shore line?

Mr. JENNINGS.—Object to it, immaterial and irrelevant. If the Court please, that would be a contradiction of what he says now.

COURT.—Objection overruled.

A. Well, I don't remember—I don't remember whether I did or did not, or whether there was such a question put to me. I can't remember. I wouldn't say that it was not.

Q. (By Mr. WINN.) The putting in of these eight additional piles [432] which you said that you put in some time after the hearing on the motion to dissolve that temporary restraining order that wouldn't bring your trap any closer to the shore line, would it? A. No, sir, it would not.

Q. Now, Mr. Alexander, where is this bluff on the shore line on Barron's property if—is it anywhere in the neighborhood of the prolongation of the line of the lead of your trap? A. Why, the—

Q. The highest part of the bluff?

A. I don't just quite understand it.

Q. I say, suppose you prolong the line—the lead of your trap on to the upland, etc., would that strike what you term the highest part of the shore line on Barron's claim?

A. Well, I don't think it would strike the highest part. I would cover—just strike the southerly end



(Testimony of C. J. Alexander.)

of this cliff that has been described—between the end of the lead and the sandy beach described in the complaint.

Q. Yes. Now, then, Mr. Alexander, you say, I believe, that in the construction of your trap the way you ultimately finished it and the way it is now or the way you fished it, and that it does interfere with the ingress and egress of that part of the upland of Barron's that it comes out in front of? Then, you mean that part of Barron's claim that extends from where your lead line would intercept the lower boundary line of Barron's claim with the corner No. 1, do you?

A. No, I did not. I mean where my lead would end. There has been a misrepresentation as to that line in evidence here. That lead never ran up there to connect with the upland by cable to it or anything else.

Q. Well, now, what do you mean that it would interfere with a portion it is in front of? [433]

A. Yes, sir, if you wish—

Q. Would you say, Mr. Alexander, that in the fishing of this trap last summer that you didn't have a cable that run from that last pile off to the shore here and connected it with web in there?

A. Oh, yes; but not fastened up on the upland as has been described here in this evidence, because it didn't run to the upland, but run to low-water mark or just far enough above low-water mark to enable me to fasten it to the rock and so as to get shear of mine under it and to hold it.



(Testimony of C. J. Alexander.)

Q. You would have your lead line run up as far as ordinary low tide?

A. Yes, sir, and I admit that.

Q. Well, taking that in consideration, that would leave your trap then covering a space from the nearest pile which is marked on this map, Plaintiff's Exhibit "D," then one hundred and forty feet from shore. Now, with that fact, extend that line prolonged on up to the shore, then you contend that you would only interfere with the ingress and egress to Barron's claim from that point out to corner No. 1 of Barron's claim—is that it?

A. Well, I wouldn't care to testify as to anything to that plat because that is an incompetent and incorrect survey of that place.

Q. You don't go much on that plat?

A. I don't think could count on it, that is the lines of the survey may be all right, but the position of the point of the trap or the points relating to the trap is entirely wrong; the soundings are wrong.

Q. Oh, I see. You don't agree with any of that part? A. No, I do not. No. [434]

Q. Well, now, when you answered the Court a while ago that it interfered with the part in front of it, what do you mean just now?

A. Well, I will explain it on the chart if I was allowed the use of the chart for a moment.

Q. Well, let's look at this exhibit "D." What part would you say?

Mr. JENNINGS.—He says that exhibit is not correct.

(Testimony of C. J. Alexander.)

COURT.—If he can explain it from that, all right.

A. Well, I can explain from that, I suppose, yes, sir; I would say that the trap obstructs that portion of the claim or the access and egress to that portion of the claim which the trap covers, taking a right angle from the meander line of this claim out on either side of the trap. With that line you have 200 feet or 400 feet or 600 feet, I would say that the trap obstructs that much of the frontage of it.

Q. (By Mr. WINN.) Well, now, isn't it a fact that the most natural place and feasible place for landing on Barron's property is along on that beach just within that distance which you have just now described?

Mr. JENNINGS.—Object, immaterial and irrelevant. The question isn't the most natural and feasible place. The only natural and only feasible place, that is the proposition.

COURT.—He may answer. Let him tell all about it.

A. Well, no; it is not, because taking—

Mr. WINN.—You have answered.

Mr. CHENEY.—Let him complete the answer.

Mr. WINN.—You say it is not. That is all your answer.

COURT.—Well, he wants to complete it, I think, Judge Winn.

Mr. WINN.— All right.

A. Because taking a right angle line from the meander line front of that claim—the meander line in front of that [435] claim, in front of the cabin

(Testimony of C. J. Alexander.)

or from this sandy beach, which is described, if you were describing a right angle from this land right out into deep water you might extend that line to the middle of Chatham Straits and this is no portion or part of that fish-trap.

Q. Now, let me ask you, Mr. Alexander, if the following question wasn't put to you on the examination on the hearing for the dissolution of that temporary injunction and you answered it as follows: "Well, isn't your trap constructed in a sort of cove"? Answer: "Yes, right in a sort of a cove." "Now, isn't that the most natural place for landing boats in that cove"? "Yes."

Mr. CHENEY.—That is the question you asked him just now?

Q. (By Mr. WINN.) Now, isn't your trap constructed right now in the most natural place, you consider it, to reach Barron's property?

A. Well, that is a hard question to answer, Judge Winn.

Q. Well, I will ask you if this question wasn't put to you, Mr. Alexander, and I want you to say yes or no to it. I want a direct answer. "Well, isn't your trap constructed in a sort of cove?" Answer: "Yes, right in a sort of cove." "Now, isn't that the most natural place for landing boats in that cove?" Answer: "Yes." Didn't you answer that question that way? A. Probably I did answer.

Q. Yes.

A. I think I remember the question, yes, sir; I wouldn't deny it, however.

(Testimony of C. J. Alexander.)

Q. Well, then, the following question is: "Isn't that a fact, Mr. Alexander?" and the answer: "It would naturally be." You answer that, didn't you that way? [436]

A. Possibly so.

Q. Well, do you say whether you did or not, Mr. Alexander. I would like to have a positive answer?

A. Well, Mr. Winn, I don't like to commit myself as I have explained to you before.

Q. Well, now, I don't want an explanation. I simply want to know and I want to go into this matter. This is an important question—I want to know—I will put these questions and I want to know whether you testified to these questions or not?

Mr. CHENEY.—This is objected to, of course, immaterial.

COURT.—He may answer.

Q. (By Mr. WINN.) "Well, isn't your trap constructed in a sort of cove?" "Yes, right in a sort of cove." Did you answer that question that way?

A. I think I answered that question that way.

Q. You think you answered that way. "Now, isn't that the most natural place for landing boats in that cove?" Answer: "Yes." Did you answer that question that way?

A. Well, I think I remember the question; yes, sir. I didn't deny it. Yes, I will answer yes, any way that I did.

Q. Now, the following: "Isn't it a fact, Mr. Alexander?" Answer: "It would naturally be." You answered that question that way. He asked,

(Testimony of C. J. Alexander.)

“If isn’t that a fact that is the most natural place,” and you said, “Yes, it naturally would be.”?

A. Yes, I guess so.

Mr. JENNINGS.—If most natural place would be most natural place.

Mr. WINN.—Well, if it please the Court, Mr. Jennings’ remarks are not called for at all. I am only addressing my remarks to you. I don’t like the record encumbered with these remarks.

COURT.—No; leave all remarks out of it, gentlemen, or [437] so much of it as we can. Proceed.

Q. (By Mr. WINN.) Now, then, you did extend your trap out to the shore so as to bring it above the line of ordinary high tide, didn’t you?

A. I did not.

Q. Well, didn’t you extend the web which constituted a part of the lead out to the line of ordinary high tide? A. I did not.

Q. Well, didn’t you say a while ago that you put a cable there and put your web on it and extended the web out as far as the line of ordinary high tide?

A. I did not.

Q. Well, what did you put out there?

A. I put a cable and some web out there, but I did not extend it on up to the line of high tide.

Q. I did not say high tide.

A. That is what I understood you to say.

Q. I say, didn’t you extend you web and cable out to where your web would reach the ordinary low tide—but your cable went above that?

A. Well, a very short distance above it there was



(Testimony of C. J. Alexander.)

perhaps where this cable was attached to the shore, attached to the boulder, perhaps this was twenty feet from the water at extreme low tide, perhaps thirty feet, I wouldn't commit myself.

Q. But your cable, so as to finish a part of the lead of your trap, did extend to the line of ordinary low-tide?

A. It did extend to the line of ordinary low tide.

Mr. CHENEY.—You said ordinary high tide in the first place.

Mr. WINN.—Well, maybe I did, yes, sir. [438]

Q. Well, now, then, Mr. Alexander, didn't you—didn't you testify upon the preliminary hearing of this case that you did not extend—didn't expect to extend the lead of your trap out towards the shore any further than it was then?

Mr. JENNINGS.—Object, immaterial, irrelevant. The Court has ruled on all that class of testimony a dozen times.

COURT.—Yes. Objection sustained.

Q. (By Mr. WINN.) Then, I will ask the—I will ask you this question, Mr. Alexander: now as a fish-trap man, if you don't know it is a custom generally as a fish-trap man, I will ask you if it is not a custom to always extend the lead of the trap as near out to the shore as you can, that is isn't that the practice?

A. O, no, not in all cases, Mr. Winn.

Q. Well, you did extend this on out, didn't you?

A. Yes, I extended this on, yes, sir.

Q. But you don't think it is customary to do so?

A. Well, it is customary in some cases. It de-

(Testimony of C. J. Alexander.)

pend upon conditions. I had my reasons of course for extending this on out and conditions were brought about which justified it.

Q. Well, now, Mr. Alexander, I will ask you if that is the usual way of building traps in these waters? A. Which is the usual way?

Q. Of extending them out to the shore line?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—The question is what is here, Judge Winn; what is customary is not material.

Mr. BURTON.—May be an impeaching question, if the Court please; I think he testified at the preliminary hearing; of course, it is not material. [439]

COURT.—Impeaching him then on immaterial matters is not competent.

Q. (By Mr. WINN.) Now, then, I will ask you if in answer to the question that Mr. Burton put to you in regard to extending this trap out to the line of ordinary low tide if you didn't state that you wasn't going to do it; wasn't customary to do it; and wasn't building this trap to catch rabbits?

Mr. JENNINGS.—Object to as immaterial and irrelevant.

COURT.—Objection is sustained.

Mr. WINN.—I will take an exception to your Honor's ruling.

COURT.—Yes.

Q. (By Mr. WINN.) Now, don't you know, Mr. Alexander, that you testified substantially and right along without putting the questions to you, that the

(Testimony of C. J. Alexander.)

reason that your trap wasn't interfering with the ingress and egress to and from Mr. Barron's property at the time this was up on the hearing for the dissolution of the temporary restraining order was that you had left plenty of water between the end of your lead and—the end of your lead at low tide and the upland for any steamer to get around in there; didn't you testify substantially to that?

Mr. JENNINGS.—Object, immaterial and irrelevant and repetition.

COURT.—He may answer.

A. I testified in the other hearing I will admit that I did not intend to continue this lead in any further; that the water was navigable through there; that I had sent boats through there and had saw boats go through there; but I don't remember as to answering it in just that light, Mr. Winn.

Q. (By Mr. WINN.) Now, we will see what you testified. Didn't you say—positively swear at that time that your trap was complete—not what you intended to do— [440] but it was complete at that time?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—The Court has ruled on that, injecting something immaterial in this case would not justify it.

Mr. BURTON.—Wouldn't that go to the credibility of the witness at the preliminary hearing? He testified he did not intend to connect it with the land. Now, if we want to test the credibility of this

(Testimony of C. J. Alexander.)

man's testimony, isn't it proper to show that at the preliminary hearing he testified that the trap was complete?

COURT.—That is all true, Mr. Burton. The rule is well settled, Mr. Burton, that you cannot impeach a man except on something that is germane to the case. Now, I say what his intentions were at that time cannot be germane. If you can show he testified as to whether or not he was cutting you off, now that is germane. Then, if he has given testimony which in some way contradicts it directly or by inference with anything which exists now, that is germane; but what his intention was at that time and what he has done since cannot be.

Mr. BURTON.—I haven't given much attention to the trial of this case but the point at issue is this: taking either your Honor's view or the view of opposing counsel, the point is whether or not the accessibility of this upland is interfered with. Now, taking that as a basis, we are endeavoring to show by this witness—he is our witness—that the accessibility of that upland is interfered with. Now, from his own statements we can impeach him on his statement at the preliminary hearing upon the motion to dissolve the preliminary injunction where he testified that the accessibility of that [441] upland was not interfered with by reason of the fact that the trap was complete. Now, this was asking for a preliminary injunction, if the Court please, and restraining them from completing any trap because it would interfere with our obtaining

(Testimony of C. J. Alexander.)

access to that upland. Now, then, we are at present prepared, if the Court please, to show by this witness that he testified upon that hearing that his trap was complete and was ample water not to interfere with the accessibility of the upland around that particular place—the accessibility of the upland around the piles as then driven—that the accessibility of the upland was in no way interfered with at that time. He testified also to the depth of the water, showing that our accessibility was easy. Now, then, if the Court please, isn't it perfectly proper to show at this time, after we have shown, for instance, by the questions to him, that these piles driven—this is done along the lead extended on from the shore, and ask him if that interferes with navigability, and then ask him if at the other time he did not testify that the access to the upland was easy because the lead didn't reach as far as that?

COURT.—Well, the Court has not excluded that testimony. The Court has said time and time again what this man's intention was at that time, what he testified as to his intention, what he said he was going to do—that was not competent. This is competent if you ask him now if he obstructs if he considers he obstructs your access; that is competent, and if he says No, then, it is competent to show that his testimony on a former occasion may be in some way in conflict with what he gives now. But the questions that the Court is ruling out are what his intentions were and what he [442] said



(Testimony of C. J. Alexander.)

that his intentions were on the former occasion: that is material.

Mr. BURTON.—Do I understand, if the Court please, we can ask him questions with reference to the accessibility at the time—

COURT.—Let us not argue.

Mr. BURTON.—I am not arguing; I want to know the point your Honor is passing on.

COURT.—I am passing on this—I tried, gentlemen, to make it clear—this man is called as an adverse witness; the Court has permitted cross-examination—the counsel to cross-examine him now on anything that is germane to the case. Now, if he testified regarding the question of accessibility or inaccessibility by reason of this structure, then anything that he may have testified to on a former occasion is germane.

Mr. BURTON.—Yes, you Honor.

COURT.—It seems to me that the position of the Court ought to be clear, gentlemen, and let us not take up so much time in controversy.

Mr. BURTON.—I beg your Honor's pardon, I hadn't taken up much time.

COURT.—That is so, Mr. Burton, but this is a court of equity and the Court is anxious to hear testimony which is material or germane, but it is so clear to my mind that this is not germane; and if the evidence becomes germane when this man is put on the stand you can go into it then. The Court is not going to exclude anything that will shed light on it.

(Testimony of C. J. Alexander.)

Mr. BURTON.—I trust your Honor is not imputing any such [443] motive to me.

COURT.—I am not imputing it to anyone, but it seems to me we are all taking up too much time with reference to this procedure. When the Court lays down what is the proper procedure I think the counsel ought to follow it.

Q. (By Mr. WINN.) Here are a couple of questions. I am going to read them off and let your Honor rule on these. This question: "Now, Mr. Alexander, was it not your intention to at least get these piles as close to the shore line as possible to prevent salmon from getting by your trap?" And then you answered: "I don't intend to enlarge—to extend these piles in to obstruct the navigable water way inside of my trap."

Mr. CHENEY.—Object to that.

Mr. WINN.—I just want a ruling.

COURT.—Yes, I think that is objectionable; I don't think it is material.

Q. (By Mr. WINN.) "That isn't now a full answer. Do you, Mr. Alexander—just answer this question—state whether or not you intend to drive those piles so as—in closer to the shore—so as to get in shallow water and prevent the salmon from getting around your trap. Answer that by yes or no." He answered, "No." And then the following question—I will read them all, then your Honor can see the purpose of them. "Then, Mr. Alexander, your complete trap, that is when completed, you want the Court to understand that when your trap

(Testimony of C. J. Alexander.)

is fully completed that there will be navigable water at the end of your trap nearest to the shore line?"

"Yes, sir." I think these questions you see, on account of that last one, are admissible. [444]

COURT.—No, I think not; I don't think any of them are admissible.

Mr. WINN.—I will take an exception.

Mr. CHENEY.—I will object to them. I did not object to the last one. I think the objection ought to be before the ruling.

Mr. WINN.—Well, he considered the objection at the time of the ruling.

COURT.—Yes.

Q. (By Mr. WINN.) The following question was asked Mr. Alexander: "How many feet are you away from the extreme low tide of the shore line?" I will just read these off and you can object to them so as to get them to the Court. "Well, I would say approximately three hundred feet." "Q. Three hundred feet out from—" And then the question is cut off. Answer: "The extreme low-water mark." Question: "Three hundred feet out into the water at the present time?" "Yes, sir." "How near to this shore line will you come when the trap is completed?" "That will be as near as I will come, approximately three hundred feet to low-water mark." That is along the same line.

Mr. JENNINGS.—Object to those questions for the same reason, that they are immaterial and that matter was decided on the other hearing.

COURT.—Objection sustained.

(Testimony of C. J. Alexander.)

Mr. WINN.—Take an exception.

Q. Just one more on that. Now, then, Mr. Alexander, I will ask you, you have testified considerable concerning your opinion as to how this trap extended with the end on the left-hand side of the cove as you go in—now, I will ask [445] you if it is possible to build a wharf out from this portion of the claim just between the intersection of the prolongation of your trap lead and the easterly side line of this claim—if a wharf was built there by Barron could have access to his upland whether or not your fish-trap as it is now constructed or as it was constructed when the motion to dissolve the preliminary injunction was had, whether or not it would interfere with the lead—would a wharf so constructed?

A. Why, in either case in my estimation, so far as the construction of a wharf is concerned, if such is possible, the conditions are just as favorable toward building a dock on that end of the claim as they are on the other end of the claim, I don't see any difference. The formation of the upland is practically the same, nice level spot in there, the beach from high to low water mark is very rocky, but you go a much shorter distance, that is you would be able to get a dock in deep water but you have a much shorter distance on the easterly end of the claim than you would on the westerly, in fact it looks to me as though it would be the most feasible place in front of the claim to build a wharf.

Q. Where?

(Testimony of C. J. Alexander.)

A. On the easterly end of it.

Q. Well, where now is the bluff you referred to—you talked about a while ago?

A. Why, the bluff extends from the end of this sandy beach here, described in the complaint, to a point just about where the continuation of the lead of the fish-trap would come if it was run up to high-water mark. [446]

Q. Well, it isn't very far off on this map, is it?

A. Well, the map as to the claim, I wouldn't dispute that, but the trap in relation to this point and this reef here and the tide lands here I don't see any similarity to the place in fact.

Q. Well, I will ask you, Mr. Alexander, if you didn't testify on the former hearing in regard to this matter, as follows: "Suppose you wanted to build a wharf out there and could build a wharf out, would your trap interfere with wharfing out from that upland?" Objection made and overruled. "Why if the wharf was built constructed on this ledge of rocks or in front of this bluff of course then it could be brought out to where the trap was in front of it." Question: "Did you say it is impossible? You want the Court to understand it is physically impossible to drive piles from the upland to the point where your trap is and you make that as a positive statement to this Court?" Answer: "I make that as a positive statement." You testified to that? A. I did, yes, sir; yes, sir.

Mr. CHENEY.—I will just ask a question of the witness, whether he understands the question the



(Testimony of C. J. Alexander.)

same as you did—this is just for my own information.

Q. You don't understand that there is—only that Judge Winn asked that question and—consider that there is any line from here up to what he has got marked the edge of the claim, that is just marked on the claim?

A. Yes, sir, exactly, I understand about that.  
[447]

Q. (By Mr. WINN.) But if—did you know at the time, Mr. Alexander, that you testified in the case before us as to whether or not piles could be driven from what was at that time the end of your lead out along the line which you did afterwards drive them?

A. I had reasons for believing that they could not be driven which can be explained.

Mr. CHENEY.—We want him to explain.

Q. (By Mr. WINN.) The fact is you testified on that hearing they could not be driven out there?

A. Yes, sir; I believe I did testify something to that effect.

Q. Now, then, I will ask you if the following questions were not put to you by Mr. Burton and you answered them as follows: "I am asking the question whether it will prevent our free ingress and egress from the shore line and from the tide at that point?"

Answer: "Why, I mean it will not in no way." "Mr.

Burton: Now, explain to the Court why it will not?"

Answer: "Because my trap is out in navigable water, because there is plenty of room inside to operate a

(Testimony of C. J. Alexander.)

vessel without interfering with the trap in any wise.”

Did you answer those questions?

Mr. CHENEY.—Object to that.

Mr. JENNINGS.—Repetition.

Mr. CHENEY.—This point is not clear now as to what point he took—that rocky point right up from the trap.

Mr. BURTON.—If the Court please, I think that is the point I understand your Honor held could answer it.

Mr. JENNINGS.—Been answered three times.

Mr. CHENEY.—Where is the point? When Mr. Burton stated the point he was evidently pointing to the map.

Mr. BURTON.—Repeat the answer again. [448]

COURT.—He may answer.

Mr. WINN.—Now, if—

A. I think I thoroughly answered the question. It was pointing to free access in and around the near end of this lead at that time that way; yes, I answered that question, that I did.

Mr. BURTON.—That is right.

Q. (By Mr. WINN.) Then, the following question: “So you want the Court to understand that there is plenty of water and will be sufficient water at the side nearest the shore line to navigate big steamers?” Answer: “I wouldn’t say big steamers, there is a limit of course, I don’t know the identical limit.” And Burton says: “Well, the ‘Cottage City’?” “The ‘Cottage City’ is gone; she will never go in.” Question: “The ‘Georgia’?” “The

(Testimony of C. J. Alexander.)

‘Georgia’; yes.” Did you testify that way?

A. I think I did, yes, sir.

Q. And that was meant, Mr. Alexander, that the “Georgia” could go around your trap and even go clear around, could get between your trap and the upland? A. That was my answer.

Mr. CHENEY.—Now, if the Court please—

Mr. WINN.—I asked him if that is—

Mr. CHENEY.—The question you read said alongside of this trap; now, he is asking a different question.

COURT.—Well, the witness is intelligent.

WITNESS.—I understand the question as I answered, as I intended it, however, that way. [449]

Q. (By Mr. WINN.) You understood it that way? A. I think so, yes, sir.

Mr. WINN.—I think Mr. Cheney didn’t but you did.

Mr. CHENEY.—If you will read it along, say right alongside of the trap.

Mr. WINN.—Well, the witness is testifying and you are not.

Mr. CHENEY.—That is all right. I want him to understand the question you have asked. You ask one question when you read the paper and then you ask another orally and change it.

Mr. WINN.—Well, the witness and I get along, Mr. Cheney, get along very well.

COURT.—Any further questions of this witness, Judge Winn?

Mr. WINN.—That is all.

(Testimony of C. J. Alexander.)

COURT.—Proceed with the cross-examination.

Cross-examination.

Q. (By Mr. CHENEY.) Now, Mr. Alexander, you were asked by Judge Winn, asked if you didn't testify on the preliminary hearing of this case that you didn't intend to extend the lead of your trap any further in shore and I believe you stated you so testified?

A. Yes, sir, I believe I testified at that time I did not intend to extend it further in shore.

Q. Now, what is the reason you testified to it that way?

Mr. WINN.—Object, incompetent, irrelevant and immaterial.

Mr. CHENEY.—This is cross-examination of the witness. [450]

COURT.—He may answer. Objection overruled.

A. That was my intention at that time, if that is the question you asked. I don't clearly understand the question, Mr. Cheney.

Q. (By Mr. CHENEY.) I asked you if you so testified, that you didn't intend to extend it any further, and if you did extend it further what was your reason for so doing?

A. That was as far as I intended to extend it at that time, for a combination of reasons and circumstances.

Q. Well, state your reasons.

A. Well, at the time of the dissolution of this restraining order, temporary restraining order, I was informed by my attorney—if you will remember—

(Testimony of C. J. Alexander.)

that there was nothing to prevent me from driving—extending my lead if I sought to up across Admiralty Island, if I so desired, that I had as much title to that upland as Mr. Barron had at that time. Now, when I went back there with my pile-driver after the dissolution of this restraining order I found that several piles, that is five or six piles in different places on that trap had worked out by the action of the sea during the period of time that this trial was in course. There was two of those particular piles that jumped out from under the end of this lead where I had finished driving on my trap; the last day I was there with a pile-driver I went in there to drive those piles. I don't remember just how many piles I had, but three or four with the driver at the time I moved in there—I drove those two, the last pile in the structure as it was when the injunction was served upon me showed—showed very hard, that is the piles did not drive far into the bottom of the sea. [451] I based my opinion largely from my previous experience there on the ground with the trap I constructed there for the Alaska Packers in former years. That was about as close as I got to the shore with that, judging the distance, and I am satisfied it was just about where the Alaska Packers' trap ended the lead, somewhere in that near vicinity. I continued with another pile and I was driving over this little hogback, apparently I found better driving again and I discovered there was another place in there between the direction of where that lead ended then and now and I got the best driving of



(Testimony of C. J. Alexander.)

any place in the trap. There was one or two piles went in there twelve or fifteen feet, something that didn't occur any place else in the trap. Now, I had occasion to examine the bottom there during the fishing season in search of an anchor that I had lost there by a boat swamping on the west side of this lead. I made note of it at the time. I think it was on the morning of the 15th of July. And I discovered in my search of the bottom for this anchor the stumps of a number of piling which had been broken or eaten off by the toredoes and which I took to be the lead line of the old Packers' trap, not knowing in fact of any other pile being driven in there before or since; which proved to be perhaps fifteen or twenty feet to the northward of my line of the present lead of my trap there now, and it is a fact, I think, the uplands make that difference. It is possible that that difference might have placed me upon the back, and that wouldn't prevent me from going in any further, that is may have put me in contact with that point running out on that old site of that trap. That wouldn't enable me to drive piles any closer, and this difference— [452] this fifteen or twenty feet to the southward, found a larger deposition of sediment and I was thereby enabled to get this line in closer to the beach.

Q. Now, in regard to what you said, what you said—I withdraw that—then at the time you did testify on the other hearing you said that the last pile you had driven was in hard ground? A. Yes, sir.

Q. And you didn't think at that time you could,

(Testimony of C. J. Alexander.)

even if you wanted to, extend it?

A. I didn't think I could from the way that pile drove and from my previous experience there I know it was a greater distance from the lead of the Packers' trap than I had driven there into the upland, I would say perhaps four hundred feet.

Q. Well, now, you were asked in regard to what you said about boats being allowed—being able to go around your lead at the time the trap—at the time of the other hearing of this case—you remember of testifying that the “Jones” could get through there?

A. Yes, sir; I remember and being an eye-witness and seeing the “Jones” and I told about one or two other small boats going around inside the lead there.

Q. Well, Mr. Alexander, when you said that you did consider that this probably obstructed this, if a person attempted to enter upon this claim between the lines that you indicated in your answer to Judge Winn's question—now, if that is the case then it wouldn't make any difference whether this lead run into shore, would it?     A. No. [453]

Q. That wouldn't make any difference so far as it being an obstruction between the two outer lines that would take in the whole trap—you understand what I mean?

A. The line I make, Mr. Cheney, will cover the entire trap I think now as it stands. I took these right angle triangles off from a correct plat which we have of the surroundings there.

Q. Yes. I don't know as I make my question plain to you though I tried to, but what I am trying

(Testimony of C. J. Alexander.)

to get at is, so far as it being an obstruction to the front of this claim, entering it from Chatham Straits out here?     A. Yes, sir.

Q. The only difference, now, between this present time and the present condition of your trap and the condition it was in a year ago when you testified would be this forty feet you put on the west side of the trap, so far as its being an obstruction to entering upon and to the survey of Mr. Barron's—

A. Well—

Q. You understand what I mean?

A. Yes, I understand you clearly, Mr. Cheney, and it might—it might broaden the line on the other side to the extent—

Q. Well, where the lead was extended?

A. Yes, to the extent of not to exceed twenty feet the way the angle of the lead stands.

Q. Yes. Then, if we estimate that as twenty feet, Mr. Alexander, on that side between the prolongation of the lead of these fourteen piles, or we estimate this part of the trap that you say you have added on here since the last trial, the forty feet, then it would only make an additional obstruction of sixty feet more on the frontage, the way you [454] figure it, than what it would last year?

A. Yes, sir, and the trap as it now stands all of it covers an area of two hundred and seventy feet, yes, sir.

Q. Yes, sir. Then, your explanation of it is in your judgment it would perhaps be an obstruction to about two hundred and seventy feet of the frontage?

(Testimony of C. J. Alexander.)

A. I would look at it as such; yes, sir.

Q. And the frontage of this claim is about what?

A. Eight hundred feet, something like that.

Q. Eight hundred feet. And that is the proportion you would say it would obstruct to anyone coming in with a boat from Chatham Straits?

A. That is, yes, sir, that is it.

Q. You didn't testify on the last trial—I will ask you if you meant in answer to Judge Winn's question that a large boat like the "Cottage City" could get inside, in between your lead? A. O, no.

Q. The boat you mentioned—do you remember which boats you mentioned?

A. Well, I don't remember; the "Jones" was one I remember and I could not recall the others.

Q. The "Jones" was a boat you had out there working, driving at your trap? A. Yes, sir.

Q. Now, Mr. Alexander, you have said that in your opinion that map is not exactly correct in some respects. Now, will you just take the pointer and show the Court in what respects you consider the map is not correct?

A. Well, I consider that it is misleading, it is constructed with a prejudiced opinion in my estimation; in the first place the contour of the beach. [455]

Q. The low-water mark is that—

A. Yes, sir; isn't quite as I consider correct. In the second place, this outlying rock or reef here is shown a great deal closer to the trap than it is in reality. As a matter of fact, what it shows there, the reef, that situation between the point of the up-

(Testimony of C. J. Alexander.)

land and the fish-trap, and in actuality the outlying reef there is lying to the southward of this point of the upland and in no way obstructs the access to the shore line or uplands between the point of the uplands and the trap.

Q. In other words, you say that this reef that they have marked out here as a sort of island between the bare rock and the trap is south of this point?

A. Yes, sir.

Q. And that it don't—it don't lessen the distance between this point and the reef?

A. No, sir; in other words, to make it plainer it is a greater distance from the corner of this trap to that outlying reef than it is from the corner of the trap to this point of the upland.

Q. Marked "bare rock"? A. Yes, sir.

Q. Now, are there any other matters—any other matters you wish to point out you don't think are correct?

A. Well, I couldn't say, of course, offhand as to the angle of the trap there and this, of course, the misplacing of that reef, and this point there possibly gives a different appearance upon the whole plat in fact and I wouldn't want to render an opinion as to the angle of the trap or as to the length of it.  
[456]

Q. How about it? You might step there and look at these soundings to see if you have anything to say in regard to the depth of the water they have placed there.

A. Eighteen—twenty-five—twenty-seven—thirty.



(Testimony of C. J. Alexander.)

I think those are correct or approximately correct.

Mr. WINN.—I object to the question; no foundation laid for it.

Mr. JENNINGS.—It is cross-examination of the witness.

Mr. WINN.—I never asked him a word about the soundings. I submit to the Court, unless the man has made the measurements—

Mr. CHENEY.—He has made the measurements. Do you object to it?

Mr. WINN.—I do.

COURT.—No, I think that the depth of the water there, Judge Winn, may have something to do with the accessibility to the shore line, if this man knows.

Mr. WINN.—I did not object to it on that ground, your Honor; I object to it on the ground no foundation made, hadn't measured.

COURT.—If he doesn't know he may say so.

Mr. CHENEY.—My object is that in response to the question he stated to Judge Winn he didn't consider the map correct, that is the only reason I am asking him if he has anything to say in regard to these measurements that have been placed by the person who made the map.

COURT.—He may testify if he knows anything about it.

Q. (By Mr. CHENEY.) If you know, for instance, there is eight feet at the lead pile.

A. Well, what is that eight feet?

Q. Well, that is an hour before low water, as I understand the [457] testimony?

(Testimony of C. J. Alexander.)

Mr. WINN.—No, Mr. Hill figured that as being low tide at that date.

Mr. CHENEY.—Well, if that is the way you figure it.

A. Well, it might be hard to say, Mr. Cheney, I couldn't dispute that or any other soundings, not knowing their exact position as being in relation to the trap and this point as I have said the map is misleading.

Q. You made the soundings yourself?

A. Yes, sir.

Q. But you don't know as you know where that is or that is you can't place them?

A. No, sir, I don't because they don't state where they are.

COURT.—Any further cross-examination of this witness?

Mr. JENNINGS.—Yes.

Q. Mr. Alexander, you said that the building of this trap only obstructed the entrance to that harbor so far as the two hundred feet of shore line was concerned?

A. Two hundred and seventy feet was my fair version of it, yes, sir.

Q. Now, have you examined the beach line there?

A. I have examined the beach line a great deal.

Q. Well, now, just tell the Court how that beach line is there—is on the beach.

A. Along the meander line of this—

Q. Of the whole claim—

A. —of the whole claim. Well, the first end of the claim—

No. 2171

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
(*In Three Volumes.*)

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JAMES T. BARRON,

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(Pages 497 to 755, Inclusive.)

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(Testimony of C. J. Alexander.)

Q. What do you call the first end?

A. From corner No. 1, I think, the westerly corner.

Q. All right.

A. From that westerly corner on up across this which is [458] described as the sandy beach—

Q. Where is that?

A. —in the complaint, that would be in front of the little cabin here—on the upland.

Q. All right.

A. From this corner in fact over to about here, I should judge.

Q. (By Mr. CHENEY.) Is it here that is?

A. Well, that is just a little bit to the easterly of the cabin in fact.

Mr. JENNINGS.—All right.

Q. Say thirty or forty feet?

A. That is definite enough to get it. That is low lying land in here. Here a cliff or bluff commences and continues to about a line with this trap would come out if it was continued to the shore, but it don't look right to me.

Q. Now, wait a minute; let's get that in the record. The bluff begins about the point marked "high" there—"high"—

A. Let's see; in relation to the cabin goes—why, I should say right about where that "h" is.

Q. All right; where the first "h" of "high" is?

A. Yes, sir.

Q. Now, how far up do the bluffs extend—how far towards the east end of the claim do they extend?

A. Well, they extend up here to where this—the

(Testimony of C. J. Alexander.)

line of this lead if it were continued on in a straight line would come out at high-water mark.

Q. All right. Then it is about the point that is marked three hundred eighty-five feet?

A. Yes, sir; yes, sir.

Q. All right. And the next—

A. And then, the beach from there on to corner No. 2 is very [459] similar in formation to the easterly beach and the extreme westerly end of the claim.

A. All right. I want to ask you about those bluffs—do they extend clear down to the line of high-water mark?

A. Yes, they extend clear down there; yes; nearly to the line of high-water mark.

Q. Is there any way to get from the upper end, the east end, of this claim down to the west end of the claim along the beach?

A. Why, you can get along the beach or there is the upland. The upland is accessible anywhere along there from one beach to the other on top of this cliff as it is described. This cliff that is described there isn't a great big high precipitous cliff, it is only a little bank.

Q. About how high?

A. Well, perhaps twenty feet, there is in the highest places, I would say; I don't think it exceeds twenty feet.

Q. All right. Now, how about the beach itself outside of this—of this little sandy place you are talking about?

A. Well, the formation of the beach is very much

(Testimony of C. J. Alexander.)

alike, that is the formation of the two ends of the claim in this—in the central part of the claim there—where this bluff is described is a solid formation of bedrock right out to extreme low-water mark.

Q. Kind of a hogback?

A. Well, it is, you might call it a hogback; it is just a continuation of the formation which you see on the upland only it is at a little lower level.

Q. Well, now, Mr. Alexander, have you made soundings there, all around there?

A. I have made soundings, a great many soundings; yes, sir, on all [460] sides of my trap.

Q. Are you familiar with the surface of the bottom of the ocean there?

A. I think I am very familiar with it, yes, sir.

Q. State whether or not in one portion of it—state whether or not it is about the same all in front of that claim. A. It is visible—

Mr. WINN.—Object to the question, not being proper cross-examination. I didn't go into this.

COURT.—It is hardly—

Mr. JENNINGS.—It is cross-examination this way, if the Court please; he dragged out of this witness—he is their witness, not our witness, and he dragged out of the witness that this did not obstruct except at one place. Now, on cross-examination we can ask him anything pertaining to the question as to whether it obstructs or does not obstruct, and one question as to whether it obstructs or does not obstruct is whether or not a building can be built in front of it.

(Testimony of C. J. Alexander.)

COURT.—Yes, it might be competent in that respect, Mr. Jennings, but it is really your case.

Mr. JENNINGS.—It is our case, your Honor, but Mr. Winn put our defendant on the stand and asked him questions and opened the whole thing, and I can ask him in cross-examination anything pertaining to which Mr. Winn brought out on direct examination.

COURT.—Yes, I think that is true.

Mr. JENNINGS.—If we want to we can develop our whole case on cross-examination of this witness because Judge Winn has thrown the doors open.

Mr. WINN.—I only threw the doors open to such questions as [461] I asked. I wish to make the objection he is an adverse witness.

COURT.—Well, the position counsel takes I take it, it doesn't make much difference whether put in now or some other time. The only reason is that it will be more logical to bring it out on your own case. But you may proceed, if you insist on it.

Mr. WINN.—But one thing, they aren't entitled to repeat it when they put him on the stand.

Mr. CHENEY.—Then, you won't be allowed to repeat it.

Mr. WINN.—I will take an exception.

Mr. CHENEY.—That rule will apply both ways, I presume.

COURT.—Yes.

Q. (By Mr. JENNINGS.) Tell us all about the soundings of the bottom of the ocean—what you found?

A. The termination of the rocky formation that



(Testimony of C. J. Alexander.)

extends between the high and extreme low-water mark is clearly visible on low water along the entire length of this claim and on below us for five or perhaps seven hundred or a thousand feet on below the claim and with the exception—

Q. (By the COURT.) I did not catch the first part of that answer. Would you repeat that?

A. The termination, that is the end of this rocky formation which extends out from high to low-water mark all along the face of this claim and on below for possibly five or seven hundred feet, or I would say a thousand feet is practically—that is, visible, on low-water *water* you can see the termination of the rocks where the rocks run off into the clear sand beach all the way along, with the exception, of course, of a little point running out here, and there just a short distance breaking the line of the rocks here and there; [462] and the whole formation in here as a matter of fact is a sand formation and nothing else.

Q. (By Mr. JENNINGS.) Now, when you say “in here” I want to get that in the record.

A. That is covering this entire bank.

Q. Covering the entire portion?

A. Entire bank.

Q. In front of the claim?

A. Yes, sir. And the bank extends from this rock down along in front of it.

Q. This rock called “reef”?

A. Reef, yes; as it is reef there, but the bank extends in this shape down that shore and as you gradually get below here it gradually cuts off, cuts off

(Testimony of C. J. Alexander.)

nearer the shore and down to here within five hundred feet below the claim.

Q. Below the eastern end of the claim?

A. Yes, sir. The bank is nearly entirely cut off. The water almost immediately gets very deep close to the shore because I would venture to say that a thousand feet below this—below the end of this claim or below this fish-trap you could stand on the shore line and throw a rock into twenty fathoms of water—the deep water runs that close to the shore.

Q. Yes, but I asked you as to what—I asked you about the surface of the bottom of the ocean there, what was it—what was it? A. Sand.

Q. Sand?

Mr. WINN.—Same objection.

COURT.—Same ruling. Exception allowed.

Q. (By Mr. JENNINGS.) It is just as good to complete a wharf [463] in one place as any other spot on this little hogback?

Mr. WINN.—Same objection.

A. The surface is just the same over that entire area.

Mr. JENNINGS.—It is cross-examination.

Mr. WINN.—It is part of your case.

Mr. JENNINGS.—It is cross-examination.

Mr. WINN.—I just want to get the objection.

COURT.—I understand.

Mr. WINN.—I say it is leading and not proper examination and this is the defendant in this case.

COURT.—Well, he is called as a witness, Judge, for the plaintiff.

(Testimony of C. J. Alexander.)

Mr. WINN.—Yes, I know, but I stated he is an adverse witness.

COURT.—I understand, anything that is germane to it or connected with his testimony in chief is cross-examination.

Q. (By Mr. JENNINGS.) Is there any reef—

Mr. WINN.—I will take an exception.

COURT.—Yes.

Q. (By Mr. JENNINGS.) Now, I understood you to have sounded all over there and are familiar with this shore line—is there any reason why a wharf cannot be built between—between the point on Exhibit “D” which is marked three hundred and eighty-five feet, the figures “385” and a dash and asterisk—is there any reason why a wharf could not be built from that point to the east end of the claim running out to deep water? A. There is none.

Mr. WINN.—Same objection and that no foundation laid for the witness to answer this, haven’t shown his qualification.

COURT.—He may answer.

Mr. JENNINGS.—You put him on the stand and I suppose vouch for his qualifications. [464]

Mr. WINN.—I didn’t put him on the stand for that purpose.

COURT.—Proceed.

A. I suppose—no feasible or scientific reason that I know of that a wharf could not be built there just as easy and well, in fact more economical than on the other end.

Q. (By Mr. JENNINGS.) More economical be-

(Testimony of C. J. Alexander.)

cause you would strike deep water sooner?

A. Yes, sir; wouldn't have to build so far.

Mr. JENNINGS.—That is all.

Redirect Examination.

Q. (By Mr. WINN.) Then, the reason why you continued the lead of this pile—this fish-trap after the hearing to dissolve the preliminary injunction was on the advice as given you by the attorneys; was it, Mr. Alexander?

Mr. JENNINGS.—Object as immaterial and irrelevant.

COURT.—That was brought out.

Mr. JENNINGS.—I know, but it is immaterial and irrelevant.

COURT.—He may answer.

A. Repeat the question again, Mr. Winn, please.

Q. (By Mr. WINN.) I asked if it is not a fact that you said a while ago to Mr Cheney that the reason why you continued this lead out the distance you say you did after the hearing on the preliminary injunction was that you followed the advice of your attorneys in that respect?

A. That is what inspired me to try to continue it, yes, sir.

Q. And that they advised you that Mr. Barron did not own that upland and that you had just as much right even to drive clear on to the upland as Barron had?

A. That was the substance of their advice; yes, sir. [465]

Q. Now, you did testify on this hearing, however,

(Testimony of C. J. Alexander.)

did you not, Mr. Alexander, that it was impossible for you to drive any more piles out in that direction along that lead line?

A. That I believe, yes, sir, I testified to that as my opinion at that time.

Q. Then, you did think at that time that your trap was complete, didn't you? A. Yes, sir.

Mr. JENNINGS.—Immaterial and irrelevant. Object.

COURT.—He has already answered.

Q. (By Mr. WINN.) And you so testified that your trap was then complete, didn't you?

A. No, I don't believe I did, that it was complete with the exception of a portion of the outside, Mr. Winn.

Q. Yes, complete with the exception of those eight piles you was going to put in?

A. Yes, I think so.

Q. Now, as to whether or not you could drive piles out further in that water was ascertained by you after the hearing was had on the motion to dissolve the temporary restraining order? A. Yes, sir.

Q. (By Mr. CHENEY.) Well, if the Court please, I don't like to interrupt; the counsel wasn't here when that case was tried; I was; no such motion to dissolve restraining order, no such motion in the records, no such motion ever made. Mr. Burton got that injunction out on Mr. Alexander on an *ex parte* application and had a hearing on complaint. We did not make any promises when it was dissolved and no strings on it.



(Testimony of C. J. Alexander.)

COURT.—It isn't material, I suppose. [466]

Mr. CHENEY.—That might identify the case.

Mr. WINN.—Yes, I understood there was a temporary restraining order in the first place granted and afterwards dissolved.

Mr. CHENEY.—We didn't make any motion.

Q. (By Mr. WINN.) Now, then, Mr. Alexander, did you—I understand you to testify that it is just as easy to come in and out to Barron's upland now as it was with your trap in the condition when that hearing was had before the Court before?

Mr. JENNINGS.—Object as immaterial and irrelevant.

COURT.—He may answer; it has been gone into.

WITNESS.—May I answer?

COURT.—Yes, sir.

A. Why, no, I did not say it was just as easy.

Q. (By Mr. WINN.) Well, now, Mr. Alexander, don't you know, as a matter of fact, that at that time your lead was five or six hundred feet away from high tide, maybe six or seven hundred feet, but at least five hundred feet from ordinary low-tide mark, don't you?

A. No, I think the evidence shows that we continued it on two hundred and forty feet further than it was originally.

Q. Do you know how many feet, Mr. Alexander, that you continued the driving of those piles that is indicated on this map, Exhibit "D," from the piles "Barron's piles" out to the end of the piles? Have you ever measured that?

(Testimony of C. J. Alexander.)

A. I don't think that I ever measured that additional distance that was covered there.

Q. Well, now, Mr. Hill has measured it, and the testimony is here, and that testimony is two hundred and sixty-one feet. Do you want the Court to understand that isn't correct? [467]

A. No, I wouldn't dispute that measurement.

Q. Now, let us see that, then, what that measurement—that is, two hundred and sixty-one feet to this end of the pile, that end pile standing on the tide land? A. No, no, sir.

Q. How far is it from that end pile to the nearest pile on the shore?

Mr. CHENEY.—What do you mean by the shore?

Mr. WINN.—The low tide.

A. Will you permit me to explain?

Q. The low tide—do you know how far it is?

A. I don't know offhand. I have all that data set down as it was taken—taken off the map—but I don't remember those data so many of them so completely.

Q. Well, it is a hundred and forty or a hundred and fifty feet?

A. Well, we will say maybe one hundred and forty, I don't know.

Q. Well, Mr. Hill has it one hundred and forty feet. You have no reason to doubt that as correct?

A. I have not; I don't think that is far amiss.

Q. That is low tide and how much farther up—that is low tide on March 11th? A. Yes, sir.

Q. Do you know approximately how much farther

(Testimony of C. J. Alexander.)

it is up from the low tide on March 11th to high tide line?

A. Why, I testified, I think, it was about one hundred feet from high tide to low tide mark.

Q. Well, if that is correct you have two hundred and sixty-one feet plus one hundred and forty, then plus this one hundred and some odd feet, which will bring it up to the neighborhood of some five or six hundred feet? [468]

A. I did not continue this lead.

Q. Oh, no; but I am giving the distance between where you had your piles driven in your lead when the hearing was had on the temporary restraining order, out to high-tide line?

A. I see; I understand the question.

Q. Then, you will be some five or six hundred feet?

A. Yes, sir; would be in that neighborhood.

Q. Now, you don't attempt to tell the Court, do you, Mr. Alexander, that a steamer the size of the boat that you have talked about and the size of the "Barron," "Anna Barron," and the size of the "Georgia," if they went in there could go in and circle around your trap just as easy now as they could when the trap was in the condition that it was in when the hearing was had on the preliminary motion, do you?

A. O, no; I don't contend that a boat would be able to go in there the size of the "Georgia" and circle around now.

Q. No, it wouldn't do it at all, now?      A. O, no.

(Testimony of C. J. Alexander.)

Q. Then, as a matter of fact, don't you consider, Mr. Alexander, that in extending that out now in that way along, as the boats may come in there and around there, that has cut off the access to that claim?   A. Not necessarily.

Q. Isn't obstructed at all?

A. The boats don't have to come in there and pretty nearly go around—around that trap in order to get access to that upland.

Q. Well, would you say it is just as easy for a boat to go in, say, on the left-hand side of the trap as you are going into Barron's property, just as easy for it to go in there and get out now as it was when you had that little dinky trap [469] at the other hearing?

A. It would if she went in there and came out the same way she went in. I have had boats in there under my own hand and between that rocky—

Q. Was you master of them?

A. I wasn't master of them, but I had charge of them and had charge of the vessel.

Q. Have you been master of any vessel?

A. I have been master of a great many boats in my time.

Q. Well, of what have you been in the waters up here?

A. Well, I have had several of my own boats, the schooner "——."

Q. What size boat is she?

A. A vessel of twenty-seven tons.

Q. About how long?

(Testimony of C. J. Alexander.)

A. Sixty-three feet, all over.

Q. What depth?

A. Draws six and a half feet light.

Q. Now, do you want the Court to understand—as you know something about navigation, and I want to find out if you know—do you want the Court to understand, knowing some of the conditions about navigation, that it is just as easy to go in and out of Barron's place on the left-hand side of the trap as you go in with your trap in the condition it is in now, as it was in at the time that preliminary hearing came up? A. Why, I think I would.

Q. You answered that question?

A. Yes, but I wouldn't hesitate for a minute to go in there with a small boat.

Mr. CHENEY.—Let him answer.

Mr. WINN.—He said he wouldn't hesitate—I just wanted his [470] expression.

Mr. CHENEY.—You keep cutting him off each time.

Q. (By Mr. WINN.) Now, then, you consider, then, that this dock—let me see that map, he has got the distances—well, you see the distances he has got down would be as—you haven't seen our maps and measurements—then you want the Court to positively understand now that in taking in consideration all the room there is between your trap and the peninsula it is just as easy, I say, to go in there in all kinds of weather and all times of night and get out with a boat as it would be though you didn't have that addition put on your trap?



(Testimony of C. J. Alexander.)

A. Yes, I think so; I think just as easy because on account of that right angle course you would have to make there, the right angle turn in order to get out, the other way it would not be any safer than it would be to come out the way you went in.

Q. Suppose a man went in there with a tow, a boat the size of the "Anna Barron"?

A. A man has no business in there with a tow.

Q. Never did have even before the construction of that trap?

A. Never would with a tow in the position that would bring it between that reef and that trap because the tow isn't in position.

Q. I understand, Mr. Alexander, if your trap wasn't there and a boat went in with a tow that wouldn't be between your trap and the reef if the trap wasn't there?

A. No, that wouldn't be between the trap and the reef if the trap wasn't there?

Q. You say without the trap in there at all a boat would have no business in there with a tow?

A. Yes, sir, I say that.

Q. Now, do you want to say that without any trap there a man [471] could go in there with a tow and safely get out?

A. No, sir, a boat would have no business in there, it would be entirely out of position to go in there inside of it to anchor because no room in there to anchor a tow.

Q. Then, do I understand you to say this is no shelter at all in case of a north wind for boats of

(Testimony of C. J. Alexander.)

the size of the "Anna Barron" and other boats to go in there with a tow?

A. I said, we are not talking about boats at all; we are talking about safe places to go with a tow.

Q. Now, I will ask you, you have qualified as a steamboat-man, if you were going up there and struck such a head wind that required you to take shelter in there with a steamer like the "Anna Barron" with a tow of logs, would you consider it just as safe to go in there with a tow there now with the trap in as if it wasn't there?

A. I wouldn't consider going in under no circumstances with a tow of logs there with the trap there or without the trap, because going in there that close to the shore with a steamer of the size of the "Anna Barron" with a tow of logs—

Q. Well, let's see, Mr. Alexander, your trap extends fully out as far as the protected point?

A. No, it doesn't, it is shown—it is in that map but in reality it doesn't as you will see.

Q. You are sure of that?

A. We will bring evidence to show.

Q. I want to know what you think about it now.

A. Well, I think that the plat is incorrect in so far as the trap is shown to extend a greater distance from the shore than in reality it does, in relation to the points of the upland and the reef there. [472]

Q. Have you measured to ascertain as to whether or not that Hill's map so far as the trap being put on there is out of shape?

A. Yes, sir, the trap is either too long or the reef

(Testimony of C. J. Alexander.)

is too short one way or another; I don't know which it is.

Q. Now, let me understand—from this, Mr. Alexander, you know where your trap is?     A. Yes, sir.

Q. You have fished it there?     A. Yes, sir.

Q. And fished it for the Alaska Packers' Association?     A. Yes, sir.

Q. And you know where that reef is?

A. Yes, sir.

Q. Now, I want to ascertain from you, Mr. Alexander, suppose you were drawing a line parallel to the upper line of Barron's claim down to a point down and across below, just below the end of your trap, as to whether or not that your trap wouldn't extend out further toward that line than either one of these other points? .No parallel to this?

A. I understand you, but I am taking some other observations that I am conversant with.

Q. Yes.

A. Well, the trap doesn't extend out as far in relation to that point in the reef as it is shown in that plat; no, sir.

Q. Well, then, the fault you find in that trap—with the map is that the trap is either too long or the point does not extend out far enough?

A. That is the idea. In that respect it is wrong, in that respect.

Q. Now, just—just in reality, in fact does your trap extend out [473] further than the point, or does the point extend out further than the trap?

A. The point extends out further than the trap.

(Testimony of C. J. Alexander.)

Q. You swear to that positively?      A. Yes, sir.

Q. And when I say extends out further I mean extends out further towards a line that would be parallel to the upper side line of Barron's claim?

A. Well, I wouldn't swear to that because it is hard to carry out those parallels with the eye a distance away from the chart without an instrument to do it with, but I have made other observations with relation to the trap and the point which positively demonstrates that the plat is incorrect I wouldn't say that in reality the point does extend out further than the trap but it extends out further in relation to the trap than is shown there.

Q. Then, as a matter of fact, Mr. Alexander, you didn't think about extending the line of your trap any further than it was on the hearing of that preliminary motion until you had advice from your attorneys?

A. No, I did not think of it at the time of the restraining order; at the time the restraining order was served on me I did not consider extending it any further in at that time, didn't consider it possible to extend it further in at that time and—

Q. Now, you talked about some soundings there that Mr. Jennings questioned you concerning, and when did you make those soundings?

Mr. CHENEY.—We are going into those on our case, that would not be proper now.

Mr. WINN.—He asked about it. [474]

COURT.—You have gone into it, Mr. Cheney.

Mr. CHENEY.—But he asked him about these

(Testimony of C. J. Alexander.)

soundings on this map and he didn't know anything about them.

COURT.—Mr. Jennings asked him about that whole front.

A. I know. I can get at the date of these soundings, Mr. Winn.

Q. (By Mr. WINN.) Well, approximately, I don't care about the exact date.

A. Well, it has been recently; it was—

Mr. CHENEY.—We would have to get our map and soundings on there. We expect to do that.

A. Its date, Mr. Winn, well, I have in my time-book showing the time that this engineer was on that work and I think how many—

Q. (By Mr. WINN.) It was within the last week or two?

A. Within the last two or three weeks.

Mr. CHENEY.—I don't think it is fair to this witness and I don't believe it is competent for counsel to ask the witness about a map which shows these soundings which he helped our surveyor to make there and dispute him. If you want the map in we will get the map and put him on.

COURT.—Yes, the witness—if the witness says he can't remember then I can pass on it. Counsel is only asking him as to what he recalls of those measurements.

A. I have testified to that, Mr. Winn, I think that—I could not remember that, my recollection is not clear on the dates we made those soundings.

Q. (By Mr. WINN.) I am not asking about the



(Testimony of C. J. Alexander.)

dates, Mr. Alexander. I am asking you just concerning the testimony Mr. Jennings asked you, you told Mr. Jennings you had made soundings all along over here and how you found the bottom etc.? [475]

A. Yes, sir.

Q. Well, approximately, when was it you made those soundings?

A. Well, I have sounded—sounded that thing thoroughly in the year 1907, I sounded again the year 1909, I sounded again for the purpose of locating this trap which I have there now in the month of January, 1911, and I have taken careful soundings and observations there a great many times this summer in a great many different directions to ascertain if I could improve the condition of this fish-trap.

Q. Yes. Then you have been sounding the bottom over this period of time, but you didn't know that you could drive any piles in further in toward the shore on your lead line until Mr. Cheney told you that you had a right to do that and that was sometime last summer?

A. I discovered that, yes, sir; discovered that after that Mr. Cheney had given me this advice that there was nothing to prevent me from driving these piles there.

Q. Now, you had been sounding there a whole lot before that but you didn't ascertain that was a good driving ground up to that time?

A. The soundings, if you please, gives you no indication of the surface of the ocean under it.

Q. How long have you been, Mr. Alexander—

(Testimony of C. J. Alexander.)

didn't you drive that trap for the Alaska Packers' Association?     A. Yes, sir, but—

Q. Wait a minute—     A. Yes, sir.

Q. And you say you drove that trap for the Alaska Packers' Association right along from the same line as it now is, didn't you?

A. As near as could, in my judgment, yes, sir.  
[476]

Q. And then, when you did put your trap in there last year you knew from having driven the Alaska Packers' Association's that you could drive it in further, didn't you?

A. My trap as I have it stands now I have testified and will testify again, the row of pilings and the lead line extend two hundred feet or more further or nearer to the shore than the trap I had there for the Alaska Packers.

Q. I thought you testified a while ago, Mr. Alexander, that when you went to Cheney here, when Cheney told you you had a right to drive out there because you owned the upland just as much as Barron, I thought you testified you went to work and found some stumps of old piles there and that led you to believe you could get in and drive it there?

A. You misconstrued my answer, Mr. Winn.

Q. Let me understand, then, your trap as it is now constructed wasn't constructed just as the Alaska Packers' Association's?

A. It is practically covering the same ground other than a little more is extended nearer the shore by two hundred feet because as I explained as I have

(Testimony of C. J. Alexander.)

discovered since the lead line is setting perhaps fifteen or twenty feet further to the eastward than Alaska Packers' trap was and I think it is in shallower water on the outside; that is that the Packers' trap was driven out further into deep water on account of having longer piles to construct it so.

Q. I see; then your lead is closer in shore than the Alaska Packers'?

A. It is closer yes, sir, by two hundred feet or more.

Q. Now, when you drove that for the Alaska Packers' Association you didn't ascertain as to whether or not you could get in any closer to the shore?

A. Yes, sir, for the Alaska Packers' Association I drove in until [477] the piles fell down with me, couldn't stand the pile up, couldn't drive one in the bottom that would stand.

Q. And you drove those along the lead line as you have it now?

A. Just on a line probably fifteen to twenty feet further to the westward.

Q. Well, the fifteen or twenty feet to the westward you couldn't get that pile to stand for the Alaska Packers' Association?

A. I couldn't ever get in this direction, that is I couldn't—

Q. In how far?

A. Couldn't get them in as I have explained within two hundred feet or more as far as I am with this line now as near the shore.

(Testimony of C. J. Alexander.)

Q. Well, now, didn't you testify on that preliminary hearing, Mr. Alexander, that you had sounded all around within a thousand feet of your trap here and had found it all good ground to drive in?

A. Yes, sir, I verify it.

Q. Yes.      A. Yes, sir.

Q. Well, now, I will put it within that thousand feet on either side of that trap, you failed to drive piles for the Alaska Packers, that is, you drove them down to such an extent that they couldn't go down any farther—they broke off?

A. My evidence was that I was able to drive along that back anywhere within a radius of one thousand feet, piling an equal distance almost anywhere along after you got out some distance from the shore, three or four hundred feet, maybe the evidence will show, I don't remember just what it was, but it was about that distance anyhow.

Q. After you got out three or four hundred feet from shore what do you mean by the shore line, ordinary high tide or what? [478]

A. I mean after you get out three or four hundred feet from the ordinary line of low tide you are able to drive piling or may drive a wharf out to withstand the action of the tidal currents of the sea there, could anywhere all along the face of that claim there for a thousand feet along the shore which I spoke of.

Q. Then, that would mean if you get two or three hundred feet down from this line of low tide which would throw you down pretty nearly along "Barron's piles"?      A. Yes, sir.

(Testimony of C. J. Alexander.)

Q. And then along in here?

A. Anywhere along there.

Q. You found you could drive piling in there?

A. Yes, sir.

Q. But this discovery that you could drive piles further up towards Barron's property that was discovered later than this?      A. Yes, sir.

Mr. WINN.—That is all.

COURT.—That is all.

Recross-examination.

Q. (By Mr. CHENEY.) Mr. Alexander, I just want to ask one question. At the time you talked that matter over with me after the injunction was refused in this case you remember me stating to you that Mr. Barron hadn't even filed an application for patent in the Land Office?

A. Yes.

Mr. WINN.—I object to it as incompetent, irrelevant and immaterial. [479]

COURT.—It isn't material.

Mr. CHENEY.—He stated his reason; I thought I had the right. That is all.

COURT.—That is all. Any other witnesses, Judge Winn?

Whereupon plaintiff rested his case in chief.

Mr. JENNINGS.—Comes now the defendant in the above-entitled cause, plaintiff having announced that he would rest his case, and moves the Court to make and enter a decree in this case dismissing this bill, for the reason that the evidence offered in support thereof fails to reveal any legal or equitable



ground which would justify the granting of the prayer for an injunction or the awarding of any relief whatsoever to the plaintiff.

I will just state briefly the grounds of the motion, if the Court please. The testimony in this case has shown, it seems to me, quite conclusively that this—this alleged harbor or that the locus of this—of this fish-trap is only valuable for three things: One is as a mooring ground, a place, a harbor of refuge for vessels in case of strong northerly winds blowing. Second, as a fish-trap site. Third, as a—as a place upon which the defendant—as a place in which the defendant desires to erect a cabin for the purpose of housing a watchman—the plaintiff I mean, the plaintiff desires to build a cabin for the purpose of housing a watchman to watch its fish-traps—his fish-trap. Fourth, that the plaintiff desires to establish a place wherein he may store gasoline, distillate or naphtha.

Now, the testimony shows, if the Court please—I won't say the testimony—but claim rather—if the foundation of this injunction—this injunction that is sought by plaintiff, that this is a good mooring ground and that by virtue of the fish-trap the defendant destroys his mooring ground, then it is alleged in substance that it is a menace to navigation. In other words, that [480] he interferes with the navigation there—navigation of Chatham Straits, and that being so, if that is the only ground, why it wouldn't—the action couldn't be brought by Mr. Barron, has to be brought by the United States on the relation of Barron, or has to be brought by the District Attorney, or there would have to be some complaint that it is

a menace to navigation, some complaint by somebody else except just Mr. Barron himself. Second, I contend that if the injunction sought be referable to the fact that Mr. Barron wants to build a fish-trap, that the ownership of the uplands conveys no rights upon him to build a fish-trap any more than anybody else and that he has no right that we have invaded by building our fish-trap, so far as his desire, it is his desire to build a fish-trap is concerned. And it seems to me that the evidence that he intends to use or wants to use it for anything else is inconsequential. The idea that he wants it for a place to store some distillate or naphtha for gasoline launches when it is five miles from his headquarters and five miles from the place where he keeps his boats is, to my mind, very fishy.

But not only that, if the Court please, but the evidence in the case shows that, if that is his object, then his access, his ingress and egress, to his upland is not cut off because the testimony shows that he could build a wharf right out joining on to the fish-trap, and that is a complete and feasible and satisfactory access and egress—access to and egress from his upland. And I don't see what equity has been shown in this case.

COURT.—Well, I might say, Mr. Jennings, in a matter of this kind, regardless of what the Court may think of the evidence as to its sufficiency, and, of course, I am not prepared to say at this time, yet even if it were doubtful as to whether a case had been made, my judgment would be in [481] an equity case the Court ought to hear the case out, then there

is only one appeal.

Mr. JENNINGS.—I just made the motion for the sake of the record.

COURT.—If the Court should take the motion seriously and nonsuit the plaintiff at this time, if the Court appeared to be in error it would require a remand to this court and a subsequent trial, and for that reason I do not think it is necessary for the Court to hear argument on either side because I am satisfied that the Court would not, in the view I take of the case, sustain the motion at this time. The motion may be overruled.

Mr. JENNINGS.—We except, your Honor.

COURT.—Yes.

Mr. CHENEY.—Call Captain Rowe. [482]

**[Testimony of J. G. Rowe, for Defendant.]**

J. G. ROWE, being duly called and sworn, testified as follows on behalf of the defendant:

Direct Examination.

Q. (By Mr. CHENEY.) Captain, state your name to the Reporter there, will you?

A. J. G. Rowe.

Q. What is your age, Captain? A. Age 53.

Q. You are a sea-faring man? A. Yes, sir.

Q. How long have you been a sea-faring man?

A. As long as I can remember; almost all my life. I was a very small boy when I started.

Q. From what coast? A. On the Maine coast.

Q. On the Maine coast. Have you been engaged in—well, I will ask you what business you have been engaged in in Alaska? A. Fishing.

(Testimony of J. G. Rowe.)

Q. What boat, if any, do you run now in connection with the fish business?

A. The "Anita Phillips."

Q. I will ask you whether or not you have had any experience in the conduct of your business along the shore of Admiralty Island, from Point Retreat down towards Hawk Inlet, in that section of the country?

A. Yes, sir; fished there—well, I am familiar. I fished up and down there every year for ten years.

Q. Ten years?

A. Not steady, you know, may be there one week, then might go some place else, but off and on during the season always [483] go there a few trips every season and fish that shore.

Q. Are you acquainted with the little cove down below Funter Bay on the shore of Admiralty Island where Mr. Alexander has a fish-trap?

A. Yes, sir.

Q. How long have you known of that cove—about how many years?

A. Well, ever since I have been fishing; about ten years.

Q. About ten years?      A. All of ten years.

Q. Now, Captain, in your experience of ten years on that coast I will ask you whether or not you consider that cove a safe harbor?      A. No, sir.

Mr. WINN.—Wait—we want to object to it as incompetent, irrelevant and immaterial for any purpose in the case, just to save the record, your Honor. The question, your Honor, is—I might indicate to you—is not that whether or not this is a place for



(Testimony of J. G. Rowe.)

landing steamers and a harbor generally, but I apprehend that if I should own a piece of land that abutted on navigable water and it was so precipitous down to the water that it was impossible to reach the water at all and it dropped off immediately for three or four hundred feet, then, if I come in and complain to the Court that somebody is cutting my access off to deep water there might be some question, that is, as to whether or not that by nature I could reach my upland anyway. Now, the question as to whether or not the captain considers this a safe harbor or it is a harbor generally for traffic, generally for navigation purposes, I don't think it is material in this case at all. I state candidly to your Honor that our main object in showing that and our only object was to show that [484] if unobstructed in front of our property that by nature we could reach it. Now, when it comes down to the question of the quality of this harbor and so forth, I don't think that question, your Honor, is material in the case at all.

COURT.—I don't think it is material in the case myself, Judge Winn. I didn't think it was material when offered by you.

MR. WINN.—It was only to show by nature we are entitled to the privilege if we desire to exercise it. If, for instance, a piece of land if a mountain or so precipitous that where it abuts on the water that the water immediately dropped off several hundred feet and then we wanted access to get back and forth, then the question would come: Can you ever get there any way?



(Testimony of J. G. Rowe.)

COURT.—That is just the view I take of it exactly.

Mr. WINN.—And it was to show that we had by nature an access there to get in and on. I don't think the question of the quality of the harbor is material.

COURT.—If that is the view of the case you have, then it must necessarily follow that you must prove that you want to use it at this time for some specific purpose, for the man who has a precipitous bluff, if he has any rights there, has just the same as if you have a good harbor. So I take the same view as you do; that is the view I took from the commencement of the case; that is the reason I don't think any of this evidence is material. I think it is a practical question entirely and not a theoretical one, and I think it is just as you have stated. I think you have put the case very clearly and very fairly; that if a man owns a precipitous bluff along by the sea or abutting on navigable water in the nature of things he has no use for littoral rights and [485] if that is true, then it follows that, even the man that has the good harbor if he has no use for it, unless he is going to put it to some use, that he can't complain; that is the reason I think that this evidence was incompetent. It was immaterial for you and I think it is immaterial for the defendant.

Mr. WINN.—Of course, I don't consider the same side of it.

COURT.—I know.

Mr. WINN.—The question is to show that we had a place there that is good for our purposes of access

(Testimony of J. G. Rowe.)

for practical reasons. Now, he is going into the public harbor purposes.

Mr. CHENEY.—I am simply answering the testimony of Captain Thornton—this was a good harbor for a west wind, northwest and northeasterly wind. If he was allowed to do that, wouldn't be fair to cut us off.

COURT.—But counsel now says that the only reason he offered that evidence was to show that the harbor is such as to enable him to have practical access to the harbor.

Mr. WINN.—Now, whether Captain Rowe could use it or has been using it or any other fisherman has been using it. If we have been using it as making our ingress or egress for whatever purposes we want to use it, then I think it is material. Now, coming into the public harbor purposes, I have no particular objection except to say that is outside the testimony, that we haven't gone into anyone else's using it at all.

COURT.—I think it will unnecessarily prolong the case, gentlemen. If you say it is going to be an important matter before the Appellate Court, in that case it should go in. I don't want to exclude testimony, but I will tell you frankly now, so far as I am concerned, it can have no influence [486] with me, in accordance with the view I take of the case.

Mr. CHENEY.—Well, your Honor, it wouldn't take over three minutes this testimony. I am not going to ask him anything except in rebuttal of the testimony of Captain Thornton.

(Testimony of J. G. Rowe.)

COURT.—You object to it, Judge Winn?

Mr. WINN.—Oh, no, if he wants to testify. Go ahead.

COURT.—Make it as short as possible, gentlemen. It is just adding to the record and making it more expensive for whoever has to use it hereafter.

Q. (By Mr. CHENEY.) Well, I will ask you the question again, Captain. Do you consider that little cove a safe harbor, a safe protection for vessels, and if in any kind of a wind? Just state to the Court what your opinion of that is.

A. No harbor at all; it don't make anything like that a harbor; there is no harbor or other safe place between Funter Bay and Hawk Inlet, and Funter Bay and Point Retreat, and there is no safe place for no boat to anchor, no matter whether small or large, unless you take her up on the beach. Now, I have anchored in that cove in all kinds of wind. We fished there just below that trap. So far as being a harbor for us, when we get bad weather either have to go to Hawk Inlet or Funter Bay to weather it. We never think it is safe to anchor along that beach. The wind that comes from the west, southwest and southeast come up the straits. I call down east and west and northwest, that is the wind the fishermen never use—the northwest that comes down the straits and if it don't come too hard you can anchor there, but if it does it is something like Sheep Creek, you know. You can anchor by tying to a tree and hanging on. The wind coming up fifty or sixty miles, comes out of Icy Straits from the southwest

(Testimony of J. G. Rowe.)

or west, has got a considerable [487] play across that straits and that way without place from Hawk Inlet to Funter Bay and no harbor there; because the fishing boats carries the anchor on the bow. We have an anchor and chain and that weighs 450 pounds and we are supposed to anchor in that place and along that shore there is no safe anchorage for nothing except at Funter Bay and Hawk Inlet for nothing anywhere along that shore.

Q. Now, Captain, I show you a Geodetic Survey chart.

Mr. JENNINGS.—What exhibit is it, Mr. Cheney?

Mr. CHENEY.—If the Court please, there is some red rings around here and I will, when Mr. Birkinbine takes the stand, I will have him testify to those. It is simply made for the purpose of showing the distance.

COURT.—You can mark it for identification now.

Mr. CHENEY.—Very well. I will have this marked Defendant's Exhibit 3 for identification.

Q. Now, Captain, if you will just look at this Defendant's Exhibit 3 for identification?

A. Here is southwest and east. Winds can come right in here, according to this—this is down towards Killisnoo. It can come—get a clear sweep, isn't a thing to stop it from coming clear down below Killisnoo, right to the waters of this—this bight in here. Well, in here is a bight like just inside of this there that is a bight.

Q. You mean on which side of Alexander's trap?



(Testimony of J. G. Rowe.)

A. Down by the southward shore by the compass.

Q. Southward or eastward?

A. Southward or eastward—you come in this way down from Port Killisnoo.

COURT.—You have got to speak louder.

A. We come in from southward or eastward to anchor. [488]

Q. (By Mr. CHENEY.) Yes?

A. The water is deep on this side there above where the trap is—is a kind of rocky-like reef and a big kelp bunch to the south and we come in from the south'ard.

Q. If this cove has any protection at all from any wind, which wind would it be?

A. Northwest wind coming down the Straits. I can't tell you exactly the course because I haven't got the parallel located here, but we steer by her compass; our course always going up the Straits on a northwest wind coming down—

Q. Or north wind?

A. Well, the only wind that would be any protection on this shore would be a northeaster, what I call a northeaster; that is the only protection there is. There is some protection there for a wind coming down the Straits; you can get well under the shore and anchor there, then take a line and run up to a tree and then you can hang on.

Q. But no protection for any other wind coming out of Icy Straits or up Chatham Straits?

A. No protection whatever.

Q. Now, I will ask you, I don't know, are you—



(Testimony of J. G. Rowe.)

are you somewhat familiar with—with the upland in shore from Alexander's trap—you have been there since that trap was built?

A. Yes, sir, I was there the first year it was built.

Q. Now, if you were coming in there, Captain, to anchor, which side of that trap do you consider the best place to go in, that is the east side of the trap or would you—southward face or the west side?

A. The east side. Come in from the east side because a big kelp bunch—big kelp bunch and rocks the other way, just above the trap—the trap—there is a big rock pile and kelp bunch; and [489] the water is deeper and you come because you get close to the shore until you get in—you go in that way and anchor.

Mr. CHENEY.—That is all, Captain.

COURT.—Cross-examination.

Cross-examination.

Q. (By Mr. WINN.) Well, Captain, that water is such there you can go in there and anchor and can reach the upland around that little harbor, can you not? A. No harbor there.

Q. But you talk about anchoring?

A. You can anchor, yes, sir.

Q. You have anchored in there?

A. We anchored.

Q. Now, then, there is not—there isn't any question but what if that trap was out of there a man could run his boat in there and anchor and get to the upland any time with any sort of a sea or in storm?

(Testimony of J. G. Rowe.)

A. I can get in there with the trap in there, the trap isn't in the way.

Q. Even with the trap in there it is good enough to go in and anchor and get to the upland?

A. Yes.

Q. Under any circumstances you can get to the upland?

A. If you have got good weather, but the trap isn't in the way.

Q. Now, when did you see that trap last, Captain?

A. Let's see; O, sometime this winter; I can't keep the date because we go back and forth; I was there last fall and last summer two or three times and I anchored in there this winter; laid there an hour or two and went deer hunting. [490]

Q. What time in the winter?

A. I don't remember.

Q. Before Christmas?      A. No, after Christmas.

Q. This last Christmas?

A. Laid there a couple of hours.

Q. The trap was there pretty nearly completed at that time?

A. Piles there; I don't know whether the whole trap was there; never took no notice of the trap; don't interest me.

Q. Now, Captain, if that was such a stormy, bad place the trap would not have stayed there all winter?

A. Why not?

Q. I am asking you the question.

A. They have got a trap over on Kake or Swanson's Harbor that is Mr.—— put it there; I think

(Testimony of J. G. Rowe.)

he has got that three years old and it is there yet, the biggest part of it.

Q. Notwithstanding this isn't a harbor, Captain, a boat could come in there in ordinary weather and anchor and get to the upland, isn't that true?

A. If it is good weather you can get to the upland now and anywhere along the beach, don't have to go in that cove, any time the weather is good, but when there is wind from the west or southeast, or southeaster, we call it, just as we call a northeast a northeaster, coming up the Straits it is impossible to lay there, impossible to land there.

Q. What about a north wind?      A. A norther?

Q. Is it in any wise protected from a north wind?

A. Yes, it is protected some from a norther, if it is a very hard norther, very hard, and want to go in there you put your anchor out, have to run a line ashore, then to let your boat— [491]

Q. You have to go up pretty close in the cove?

A. No, don't get in the cove—this point of the cove here the water is deeper.

Q. (By Mr. CHENEY.) Which direction?

A. That is the southward.

Q. (By Mr. WINN.) Then, you contend that the principal anchoring ground is on the right-hand side of the trap as you go in?      A. Right-hand side.

Q. That is the principal way?

A. I don't know which is the principal way. According to which way you go in.

Q. When you go in the right-hand side is always your right-hand side?

(Testimony of J. G. Rowe.)

A. Well, it is to the southward, it is to the southward.

Q. Well, let me ask you a question.

A. The principal way you go in there is to the southward or to the southeast.

Q. Which side of the trap do you go there to anchor? A. Leave the trap on your port hand.

Q. Which? A. On the port hand.

Q. That is where you always went in to anchor?

A. That is where I have been in to anchor.

Q. Now, Captain, let me ask you where did Alexander keep his scows and his boats?

A. Never see any scows laying there, only a scow and a little bit of a scow, that was the only boats I have saw there.

Q. Was you there when he was fishing?

A. Yes, sir, got bait. [492]

Q. Did you ever see him with any scows left to tow for his boats?

A. I saw men going in with a boat and I have been at that trap with a boat.

Q. Did you see him laying there overnight?

A. No, sir.

Q. You did state to the Court, Captain, if Alexander had any boats in there he always put them on the port side of his trap? A. The port?

Q. Yes, sir.

A. I didn't see Alexander have any boats in there; I have seen the scows, trap scows.

Q. Well, did you ever see any of those scows anchored on the port side of his trap, as you went in?

(Testimony of J. G. Rowe.)

A. No, I don't know whether I have or not.

Q. Did you ever see them anchored in there?

A. No, see them made fast to the trap.

Q. How many times were you in there after Alexander built that trap?     A. I don't know.

Q. How many times,—can you tell?

A. No, I can't.

Q. No?

A. I don't keep no record, I don't keep no record of how many times I anchor along the beach.

Q. In all, how many times?

A. I don't know, a good many times, but I don't know how many.

Q. Were you fishing for Alexander?

A. No, sir, I was not fishing for Alexander.

Q. What were you doing there?

A. Fishing—halibut fishing. [493]

Q. You went in there to anchor?

A. We went in while cleaning too.

Q. And whenever you wanted to stop for rest or a night you went in there and anchored?

A. No, sir.

Q. What were you doing?

A. Fishing, I told you.

Q. Fishing?

A. Fishing, laying there, we anchored, cleaned our fish. If the weather is good we run in close to the shore and lay somewhere most anywhere sometimes.

Q. You have never been in there a time yet but what you could go in and reach the upland on either side and get around Alexander's trap all right when-



(Testimony of J. G. Rowe.)

ever you was in there?

A. I have been in there when you couldn't stay a half hour.

Q. Well, then, you didn't get in?

A. I got in the harbor, yes, could get in the harbor.

Q. What did you do when you got in? A. What?

Q. What did you do when you got in?

A. Anchored there hung on, in a northwester, and hung on.

Q. Well, if that wasn't any better place than any other places what did you go in there for?

A. Because didn't want to go to Hawk's Inlet, that is, five or six miles out of the way, with a load of fish.

Redirect Examination.

Q. (By Mr. JENNINGS.) Just one question in order to get it in the record. In going in there, whether you would go to the right or the left of the trap to anchor there—you said you would go to the port?

A. I would leave the trap on my port hand. [494]

Q. What does that mean—just call it right or left?

A. Just the same as this way: the trap was over there and then I was going in this way and I left that trap on the port hand.

Q. You left the trap on your left-hand side?

A. Left hand or port side.

Recross-examination.

Q. (By Mr. WINN.) What size boat is the "Anita Phillips"?

A. About twenty-two or twenty-one tons.

Q. What is the length of her?

(Testimony of J. G. Rowe.)

A. Fifty-eight feet.

Q. What water does she draw?

A. What do you mean, loaded or light?

Q. Well, loaded?

A. About seven and a half feet.

Q. And light?      A. About five.

Q. Have you seen any steamers go into that place?

A. No, sir, never seen a boat anchored in there with an anchor down except the "Phillips" and the "Caesar."

Q. The "Caesar"?      What size boat is the "Caesar"?

A. The "Caesar," she is, I think she is forty-two or three feet, I have forgotten it exactly.

Q. What does she draw?

A. About seven feet of water.

Q. Both gasoline boats?

A. Both gasoline boats.

Q. Never see Barron's boat in there, the "Anna Barron"?      A. No, sir.

Q. Never see the "Georgia"? [495]      A. No, sir.

Q. Ever seen the "Buster" in there?

A. No, sir.

Q. These boats you have just mentioned are the only ones you ever saw?

A. They were the ones, I was in myself and took them in there.

Mr. WINN.—That is all.

COURT.—Call your next witness, gentlemen.

Mr. CHENEY.—I will call Captain Magill.  
[496]

**[Testimony of J. H. Magill, for Defendant.]**

J. H. MAGILL, being duly called and sworn, testifies as follows on behalf of defendant.

**Direct Examination.**

Q. (By Mr. CHENEY.) What business are you engaged in, Mr. Magill?

A. In the steamboat business.

Q. What boat do you run?

A. I own the steamer "Peerless."

Q. Are you familiar with the coast of Admiralty Island along Chatham Straits?     A. Yes, sir.

Q. Are you acquainted with the place—with this little cove that has been testified to here by Captain Rowe?     A. I am.

Q. What did you say?     A. I am.

Q. Yes. Have you ever been down there in that cove?     A. Yes, sir.

Q. How many—several times or how many times?

A. Been there several times.

Q. Yes, and you have fished around this country for how many years?

A. Well, I have operated that boat around this country for the last six years.

Q. Both fishing and towing logs?     A. Yes, sir.

Q. And piles?     A. Yes, sir.

Q. Now, I will ask are you familiar with the location of Alexander's fish-trap in that cove?  
[497]     A. Yes, sir.

Q. I will ask you this question, Mr. Magill, if you were going into that cove to anchor, would you go in on the right side, that is, on the eastward side of the

(Testimony of J. H. Magill.)

Alexander trap as it—as it is located there or would you go in up to the bight on the westward side?

A. Why, there isn't room to anchor in the bight on the westward side; I would go in on the south-eastward side.

Q. You call that the south, Mr. Magill, but it is really—it is really more east, that is the shore?

A. Well, I don't know just the trend—the general trend of the shore is north and south or nearly so.

Q. Yes.

A. But that is right along there, I guess the trend lays northeast—northwest and southeast.

Q. Is the water—is the water there deeper and is there better holding ground on the east side? Is that the reason you go on the east side?

Mr. WINN.—I object to the question; unless he confines these questions as to whether he is going in there for the purpose of reaching Barron's upland, it is absolutely immaterial, the access or ingress or egress to and from Barron's claim. We don't care about the other part.

COURT.—It is indefinite, Mr. Cheney.

Mr. CHENEY.—Very well, I will withdraw it.

Q. Captain, if you were going in there to land—are you familiar in a general way with the—with the location there that upland, is it not upland?

A. I am not familiar; I see a location notice on the shore one time; I don't know whether a homestead or what it was.

Q. You know where that piece of land is? [498]

A. Yes, sir.

(Testimony of J. H. Magill.)

Q. You say you don't know whether it is a home-  
stead or what it is; well, I will ask you, if you were  
going in there and wanted to land on some part of  
that—of that location—that ground that is contained  
in the location there, and you could go to any part  
you wanted to, but if you just wanted to reach the  
upland, for instance, and land some passengers or  
freight, which end of the claim would you go on, the  
westward or the eastern end of it over near this?

Mr. WINN.—Wait till he gets through with the  
question. We object to the question as incompetent,  
irrelevant and immaterial; there is no foundation  
laid for him to answer; he has not shown that this  
man has any papers to navigate, any papers of any  
sort; and it is not shown, if the Court please, that he  
knows anything about the waterfront of Mr. Bar-  
ron's claim.

Mr. CHENEY.—Now, if the Court please, I asked  
the question and counsel objected to it; I asked him  
then another question and he objected to it and I  
made the question to suit Judge Winn.

COURT.—He may answer.

Mr. WINN.—It is only the qualification, your  
Honor.

COURT.—Well, he says he is operating a steam-  
boat.

Mr. WINN.—I don't know; he hasn't master's  
papers, maybe an engineer.

Mr. CHENEY.—Don't make any difference  
whether he runs it or owns the boat.

COURT.—He may answer; you may bring out on



(Testimony of J. H. Magill.)

cross-examination the qualifications of the witness.

Q. (By Mr. CHENEY.) You understand the question? [499]

A. I have forgotten it just now; state it again.

Q. Well, if you were going in there and wanted to reach the upland of this claim of Mr. Barron's, which extends, I will say, eight hundred feet in length along that shore, immediately above Alexander's trap, that is, the trap, we will say, is about middle of the claim of Mr. Barron's and you wanted to land there somewhere on that shore, where would be the feasible and best place where you would land?

Mr. WINN.—Now, wait; we object to the question, incompetent, irrelevant and immaterial, and no proper foundation laid, and has not proved himself competent to testify on the matter; and furthermore, it is confining the question not to the circumstances about the trap but in there south of it.

COURT.—Let him answer; you may ask him later on.

A. Well, the stuff we did land there we anchored down five or six hundred feet below the trap. I landed all of Mr. Alexander's stuff there when the weather was so that we could, and we landed anyway three to five hundred feet from the trap.

Mr. CHENEY.—Where is that map? I have another, if counsel won't object, just for the purpose of this question.

COURT.—It would be simpler, Mr. Cheney, if you first offered your surveyor, if you have one, as a witness. He could lay the foundation and the other

(Testimony of J. H. Magill.)

witnesses could refer to it.

Mr. CHENEY.—Yes, I intended to do it, but Captain Rowe wanted to get away and I thought perhaps Captain Magill would, too.

Mr. JENNINGS.—Just ask Mr. Magill to step aside and call Mr. Birkinbine. [500]

Q. (By Mr. CHENEY.) Which side of the trap do you mean, Captain Magill, when you say below; you state you went in below the trap?

A. I mean on the—

Mr. WINN.—Same objection, your Honor. I want to take an exception to the ruling.

COURT.—Same ruling.

A. I mean on the southeast side of the trap and have the trap on your left-hand side going in.

Q. (By Mr. CHENEY.) You would go in on the side toward Hawk Inlet, toward the trap?

A. Yes, sir.

Q. Well, you said when you did land there, you generally, to do this work you were speaking of, you landed three or four hundred feet to the east or southeast of the trap towards Hawk Inlet?

A. Yes, sir.

Mr. BURTON.—He didn't so testify, six hundred feet.

Mr. CHENEY.—He testified to that and also to the other. Now, I will ask you to look at the map. That is all.

Cross-examination.

Q. (By Mr. WINN.) Mr. Magill, what steamers have you ever navigated in Southeastern Alaska?

(Testimony of J. H. Magill.)

A. I have never navigated any steamer.

Q. You have never navigated any steamer?

A. No, sir.

Q. You don't hold any master's papers or pilot's papers?     A. No, sir.

Q. Who did you have as master of your steamer when you went [501] in there, Mr. Magill?

A. I think Mr. Hunter.

Q. Mr. Earl Hunter?     A. Yes, sir.

Q. You was never in there before Alexander put his fish-trap in there?

A. Well, I never was in there prior to that time; he was getting ready to put it there; I was there when he put it there.

Q. When he put the trap in. You don't know anything about the boundaries of Mr. Barron's upland piece of ground?     A. No, sir.

Q. And when you went in there, Mr. Hunter being the master or captain of the boat landed in the manner in which you state?     A. Yes, sir.

Q. And that was from three to six hundred feet in a southerly direction from the fish-trap?

A. Southeasterly.

Q. Southeasterly direction; how far did you go in towards the land?

A. Well, we anchored, I suppose, about halfway in behind this projection that projects out, behind the rocky point there.

Q. And how far were you from the land immediately in front of you at ordinary low tide or ordinary high tide, if you know?

(Testimony of J. H. Magill.)

A. Well, I suppose we was two hundred and fifty or three hundred feet.

Q. How far did you anchor from the lead—of the trap?

A. Well, from three to five hundred feet we would be from the lead; we did not get right on the same spot each time. [502]

Q. You never was in that place at all until Alexander commenced work there?

A. I was in there one time going north.

Q. Before Alexander commenced operations there?

A. Yes, sir.

Q. What was your occasion for going in there then?

A. Well, we was going up Chatham Straits in a heavy norther and kept along that shore to get the lea and we ran under that point as near as we could.

Q. The closer you got under that point the better protection it was from the north wind?

A. The wind didn't affect us but a heavy swell came in and we had to turn and go back to Hawk Inlet.

Q. But you did try to get shelter under that point?

A. We did.

Q. But you couldn't get shelter enough and you turned and went— A. Went back to Hawk Inlet.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all. Mr. Cheney, call Mr. Birkinbine. [503]

[**Testimony of H. P. N. Birkinbine, for Defendant.**]

H. P. N. BIRKINBINE, being duly called and sworn, testified as follows on behalf of defendant:

Direct Examination.

Q. (By Mr. CHENEY.) State your name and place of residence.

A. H. P. Birkinbine; Haines, Alaska.

Q. What is your occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. Well, I am not a college graduate. I guess I came to it kind of gradually by practical experience.

Q. Well, how long have you been?

A. Well, I have been working, actually, it will be twelve years the 2d of next July. Previous to that during the summers—well, I suppose during the summers and vacations off and on I have worked since the time I was twelve years old at the same business.

Q. Was your father a surveyor?

A. Yes, sir; he was a hydraulic engineer.

Q. What is it?

A. He was a hydraulic engineer.

Q. State whether or not you are commissioned as a deputy mineral surveyor.      A. Yes, sir.

Q. And a deputy United States land surveyor?

A. Yes, sir.

Q. Now, you had experience in surveying before you came to Alaska, I understand?      A. Yes, sir.

Q. And you say since you was about twelve years of age?

A. Well, of course, that was since—that was kind



(Testimony of H. P. N. Birkinbine.)

of work in [504] the summers, during the Christmas vacations.

Q. Well, that is when you were a young boy?

A. Yes.

Q. You worked during the summer time but you say you worked steadily at it for about how many years?

A. It will be twelve years next July, that is general engineering.

Q. How long have you been working at the business in Alaska?

A. I came to Alaska—it will be four years next April.

Q. Have you been engaged in surveying during all that time you have been up in Alaska here?

A. Yes; that is general engineering. I came here on construction work.

Q. I want to ask the witness about something about a wharf later on, so I will ask his qualifications on that. Have you ever had any experience, Mr. Birkinbine, in the—in the construction of wharves?

A. Yes.

Q. Well, to a considerable extent, have you?

A. Well.

Q. Well, about how much experience have you had? Just state your experience in the construction of wharves. What you know about the construction, not all you know about it, but your experience?

A. The first place I ever had anything to do with wharves was on the Atlantic coast.

Q. Where?

(Testimony of H. P. N. Birkinbine.)

A. At Baltimore, Maryland, on tide water, connecting the shore in Maryland to tide water, that is.

Q. Anywhere else in the states?

A. Just behind Norfolk, Virginia, on the same kind of work, for the tide water and deep water railway. Of course, I have had some pile-driver experience in the east. While [505] it was on tide water, it was piling, tresselling a railroad in the Dismal Swamp of West Virginia and like a wharf. Took us two gets to get across.

Q. It was piling work?

A. Piling work in the Dismal Swamp of West Virginia and the Black Water Swamp of Virginia. I had some experience and had charge of making repairs to the wharf at Fort Seward, Alaska. Mr. Webster was in control on one instance, and another instance was repaired by our own control. About this time last year I had charge of the rebuilding of a wharf for the War Department at Fort Ward, Washington, on an island,—on an island just opposite Bremmerton.

Q. And you had charge of that work?

A. That is under the Construction Quartermaster; of course, I reported to him.

Q. And you had charge of the work at Fort Seward. Now, Mr. Birkinbine, I will ask you if you have ever visited the trap location or the fish-trap owned by Mr. Alexander in Chatham Straits, on Admiralty Island? A. Yes, sir.

Q. If so, when did you first do that?

(Testimony of H. P. N. Birkinbine.)

A. On March the 16th and 17th—I beg your pardon, on February 16th and 17th and on March the 12th.

Q. Of this year?      A. Of this year.

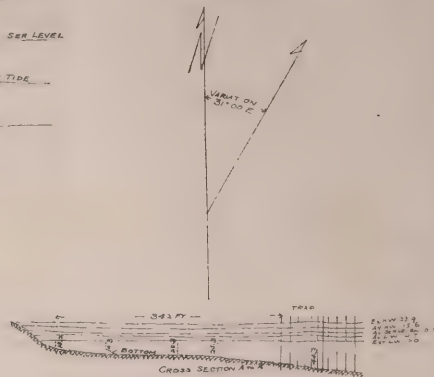
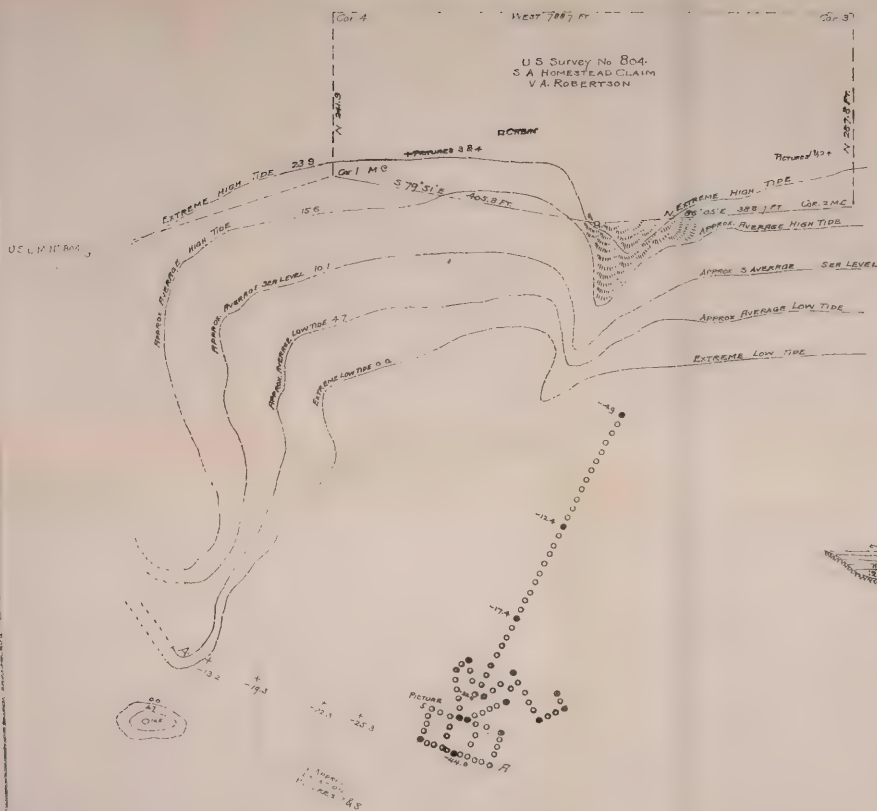
Q. You were employed by Mr. Alexander to go out there and make a survey of the ground, were you, and also the homestead location of Mr. Barron?

A. I didn't run all the boundary lines of the homestead location of Mr. Barron.

Q. Well, enough to— [506]

PLAT  
OF  
C. J. ALEXANDER  
FISH TRAP NO. 1  
AND  
V. A. ROBERTSON  
SA HOMESTEAD

Scale 100 Ft. = 1 in  
As Surveyed By  
H. M. Dickinson  
Feb'y 16 8 17, 1912



Barron  
vs  
Alexander  
Feb 14 1864

Sept 4

4 APPROX  
LOCATION  
PICTURE 6





(Testimony of H. P. N. Birkinbine.)

A. To plat it.

Q. To plat it?      A. Yes, sir.

Q. And to make a map of the vicinity there?

A. Yes, sir.

Q. Where the fish-trap is. I ask you if this is the map you made from your field-notes?

A. Yes, sir; that is the map I made.

Mr. CHENEY.—Now, I will ask that this be marked for identification. You can look at it, Judge Winn.

Mr. JENNINGS.—Don't need to mark it for identification.

COURT.—Offer it in evidence then?

Mr. CHENEY.—Yes; offer it in evidence.

COURT.—May be received.

Mr. WINN.—Well, we object to it, if your Honor please, until he testifies to the accuracy and so forth, and so on, but I do not know—I suppose it would go in then. Just some figures on it. Now, of course, if he explains them, be all right.

Q. (By Mr. CHENEY.) Was that map made by you from actual measurements taken on the ground and with your instruments and at the time you were there on February 17th?

A. February the 16th and 17th I made an actual survey of the ground and that is the result of my notes.

Q. That is a correct map so far as you are able to make one?

A. To the best of my knowledge and ability.

COURT.—It may be received in evidence.

(Testimony of H. P. N. Birkinbine.)

(Marked Defendant's Exhibit 4.)

Q. (By Mr. CHENEY.) I hand you Defendant's Exhibit 3 for identification and ask you to state what it is.

Mr. WINN.—I suppose it shows on its face what it is, if [508] a Government map.

Mr. CHENEY.—Something else he has put on there.

Mr. WINN.—But I want him to state it is a Government map. If a Government map, of course, it is admissible.

A. A Government navigation map by the Coast and Geodetic Survey of Lynn Canal and Stephens Passage, number 8300.

Q. (By Mr. CHENEY.) I will ask you if you made those circular lines?

A. Yes, sir; I did.

Q. There on that map?

A. The lines are made on a different radius of five miles there, that is 5, 10, 15, 20, 25 and 30 miles from the point, in order to show the distance that the wind would have in velocity in getting at that point—the structure.

Q. That is the object in drawing the circles?

A. That is the object; yes, sir.

Mr. CHENEY.—I offer this in evidence—just marked for identification.

WITNESS.—I will state, Mr. Cheney, that these miles are statute miles.

Q. (By Mr. CHENEY.) Well, what does this little cross represent, Mr. Birkinbine?

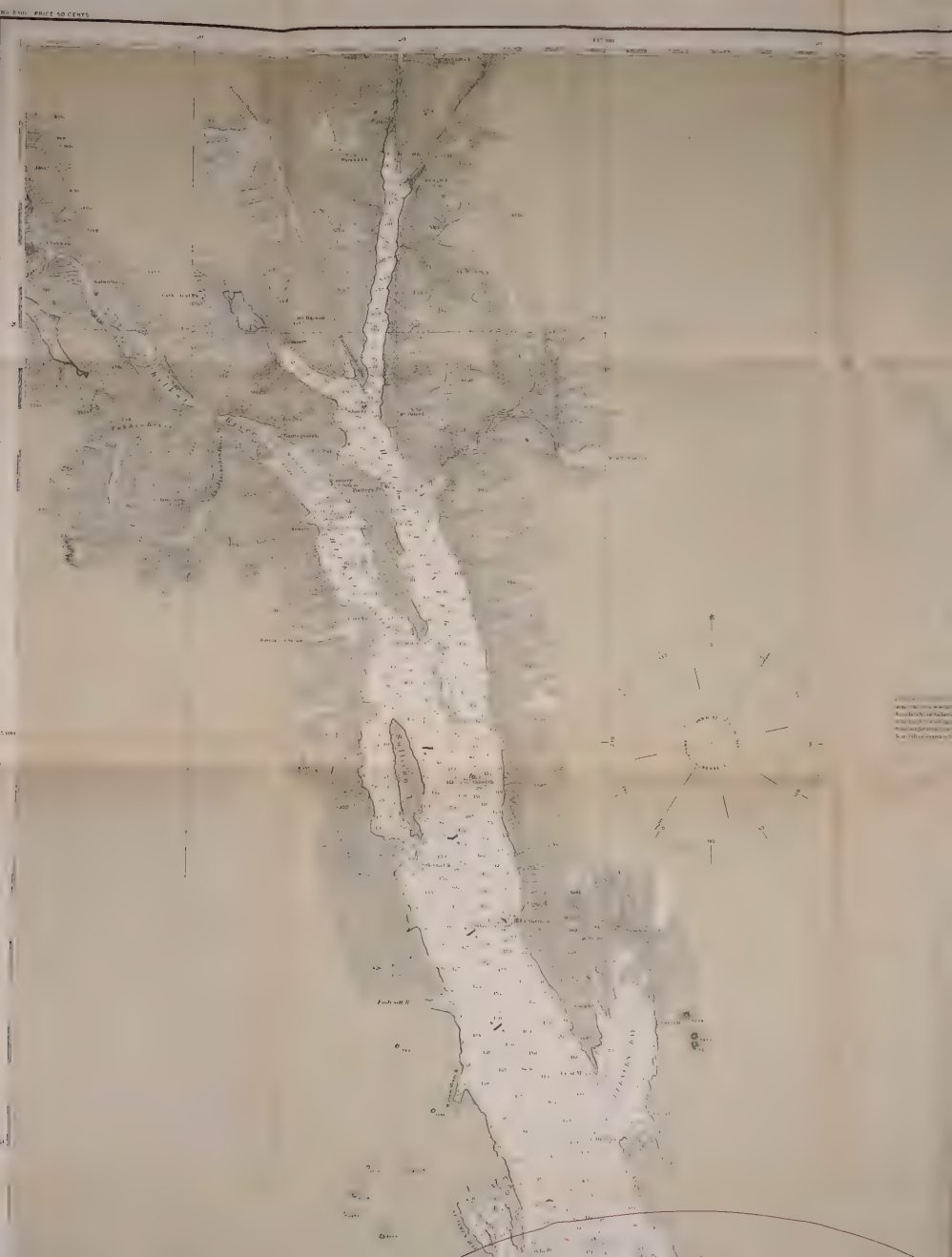
(Testimony of H. P. N. Birkinbine.)

A. That is the location of the fish-trap and the survey, which is also the center of all of the circles.

Mr. CHENEY.—I offer this in evidence.

COURT.—Any objection.

Mr. WINN.—Yes, object to it as incompetent, irrelevant and immaterial for any purpose whatever, burdening the record, so far as the testimony of the witness is concerned now absolutely immaterial, showing the velocity of the winds and other physical conditions and so on. I don't see, if your Honor please, that any need of it. [509]



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# LYNN CANAL AND STEPHENS PASSAGE

S. E. ALASKA

Scale 1:100,000

Publication Project

Published at Washington, D. C.

BY THE GOVERNMENT AND LANDS DEPARTMENT  
OF THE INTERIOR, GEORGE B. MEADE

NAME	NUMBER	DATE	REMARKS
LYNN CANAL	1	1898	First survey
STEPHENS PASSAGE	2	1898	First survey
LYNN CANAL	3	1898	First survey
STEPHENS PASSAGE	4	1898	First survey
LYNN CANAL	5	1898	First survey
STEPHENS PASSAGE	6	1898	First survey
LYNN CANAL	7	1898	First survey
STEPHENS PASSAGE	8	1898	First survey
LYNN CANAL	9	1898	First survey
STEPHENS PASSAGE	10	1898	First survey

For information: (continued)  
 Topography  
 Hydrography  
 (continued)

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STEPHENS PASSAGE	4	1898	First survey
LYNN CANAL	5	1898	First survey
STEPHENS PASSAGE	6	1898	First survey
LYNN CANAL	7	1898	First survey
STEPHENS PASSAGE	8	1898	First survey
LYNN CANAL	9	1898	First survey
STEPHENS PASSAGE	10	1898	First survey

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## NOTES

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 2. The name of the passage is "Stephens Passage".

## NOTES (continued)

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 10. The name of the passage is "Stephens Passage".









(Testimony of H. P. N. Birkinbine.)

COURT.—May be received.

(Defendant's Exhibit 3 received.)

Mr. WINN.—I will take an exception.

Q. (By Mr. CHENEY.) Now, Mr. Birkinbine, I don't know but what it would be lighter if you had that on the easel, be better light for the map. Now, Mr. Birkinbine, I will ask you to point out—to point out the lines of the survey—of the homestead, homestead survey number 804 of Mr. Barron's and explain to the Court the lines that you have drawn, referring to the different stages of the tide, in connection with this fish-trap and also the contour of the shore and the location of this reef and this point here, that is marked on the plaintiff's exhibit "bare rock," with reference to the location of the fish-trap. I am doing that, your Honor, to get along faster, not ask so many questions.

A. I first started by using—by intending to use the same meridian that was used by the official surveyor and which I suppose Mr. Hill used for his survey, as I thought that would put them all on the same base line, and I found this corner and this corner, and then from this corner I ran to here and I located—

Q. When you say "here" just state.

A. This corner No. 1—

Q. So the Reporter can get it.

A. I had better start over again. I started at meander corner No. 2 and ran to this intermediate meander over there which is on the rocky bluff, crossing the bluff, and then ran to meander corner No. 1, then reran the black lines there representing that

(Testimony of H. P. N. Birkinbine.)

part of the official survey which I ran over. These dotted lines I didn't run over; didn't see the necessity of running over them and my other work was all [511] laid out from these two front lines, and in locating the trap I only located what might be called the metes and bounds of the trap, that is a right triangle, otherwise solid black piles; the other piles were so scattered—then just the piles at the extreme ends of the lead and at the corners. The tide lines at zero, I have assumed to be extreme low tide, that is the June tide, and the extreme high tide is the upper lines which are simply represented as contours. I located, I think, it was twelve points around here with—I was using my instrument, using it first as a level and then triangulated to all these different twelve piles around here. Located this. It was approximately the same elevation that I have to approximate average high tide, and then from that and levels located the extreme high and from soundings I interpolated, locating the average sea level, the approximate average low tide and the extreme low tide. I then took soundings for the purpose of developing it—well, what might be called the mouth of this space between the rock reef and the trap, as I wanted to develop a cross-section across this mouth, if I can call it that, and these soundings were triangulated from these two points, right from these two points. First, this was located and this point was located, then this point.

Q. Now, when you say this point, this point where?

A. First, I located from corner No. 1 at the intermediate meander point the two outer corners of the



(Testimony of H. P. N. Birkinbine.)

trap. Then, I located this point marked by a dot with an "A" from these same two points by reading the boat from which the soundings were taken kept on the line or face of the trap and when they would take a sounding the angles were turned towards the position of the soundings; then the time that these [512] soundings were taken, that is, I think it took something like fifteen minutes to take the soundings and I assume in a good deal of this fifteen minutes I figured the height of the tide for that time, and then calculating what you were below extreme low tide and that gives then the soundings below extreme low tide for the mouth of that space going in between the reef and the trap.

Q. What do you—will you explain—how do you explain this here—you call this a cross-section, showing what, Mr. Birkinbine?

A. I call the cross-section showing the trap and the mouth of this space where you would take a boat to go in between the trap and this peninsula, suppose better name for it, and the cross-section represents how it would look if it were cut right down on the line where these soundings were taken.

Q. Now, I will ask you, Mr. Birkinbine, what is the depth of the water represented by these figures at the last lead pile inshore of Alexander's trap, as it now stands according to your map?

A. This is marked "minus 4.9" which means 4.9 feet below extreme low tide.

Q. That is the depth of the water as you found it at the last pile toward the shore of the trap?

(Testimony of H. P. N. Birkinbine.)

A. Yes, sir.

Q. As it was on that date?      A. Yes, sir.

Q. (By the COURT.) That is the extreme low tide?

A. That is the extreme low tide; yes, sir. I have assumed extreme low tide to be zero.

Q. (By Mr. CHENEY.) Now, that—is that map made on the same [513] scale as Mr. Hill's map?

A. Yes; 100 feet to the inch. That is it?

Mr. HILL.—Yes, sir.

Q. (By Mr. CHENEY.) Now, if there is any difference in these two maps—I am not speaking of the tide lines now, but in respect to any other matters affecting the contour of the shore in front of this homestead or off here to the left where the "A" is marked and the—and the rock with the little circle in the center, please explain to the Court what the difference is between your map and Mr. Hill's?

A. Why, Mr. Hill, I think, shows the—a tide line about at this—about this line; that is the lowest one he shows is about what I call the average low tide.

Q. Just a moment. Let's get his map here so you can explain better.

A. Yes; we get a little different shape to the end of the reef here and we get a different position for this—for this that is called end of rock, "bare rock," which Mr. Hill calls it the end of the peninsula, and we get a little different position for the reef.

Q. Yes. Now, you heard Mr. Hill testify in relation to the map that he made, didn't you?

A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

Q. And you heard him state that this reef was located by him by triangulation and by the stadia measurement?     A. Yes, sir.

Q. Now, I will ask you if you located this in the same way and placed it?

A. I didn't use my stadia. Now, in locating that reef I located it by triangulation, first.

Q. Yes. [514]

A. And then afterwards I measured the distance from this corner pile to this, the dot just right here on the highest part of this reef with a tape.

Q. What kind of a tape?

A. A steel tape. It is a little bit longer than my tape. It was—the measurement—was 421 feet.

Q. 421 what?

A. 421 feet was the distance to this dot right on the highest part of this reef, but it so happened that I had a 400 foot tape and we made it in one measurement by standing in a boat and continuing with another tape. We also measured from this corner pile to the dot beside "A" which —

Q. Just a moment. The corner pile on the eastward—on the westward side of the heart of the—

A. Southwest corner of—that is called the spiller of the trap, isn't it? I am not very familiar with the trap.

Q. Is it the pot or the spiller?

A. The pot is in the middle, Mr. Alexander?

Mr. ALEXANDER.—The pot.

A. We measured from a pile on the southwest corner of the spiller to the dot beside "A" and found

(Testimony of H. P. N. Birkinbine.)

that to be 385 feet. Of course, I could make it with one measurement with a 400 foot tape and then took the direction from one point to the other.

Q. (By Mr. CHENEY.) Now, you started to tell, Mr. Birkenbine, how it was that you measured this in addition to triangulating as Mr. Hill measured it. How else did you locate this at the spot that you have and why do you claim, if you do claim, that it is correct?

A. By my distance from here and my distance from here.

Q. Well, did you locate it any other way, by the sun or any [515] way?

A. Well, of course, I had a man with me and I though it would be in controversy and I called his attention to the fact that the highest part of this reef and the sun were in line with this, that is from the dot beside "A" to the dot on the reef and the sun meeting a line out where we stood at two o'clock in the afternoon. Of course, the sun is south at noon and travels toward the west and I wanted him to get the direction without me giving it to him.

Q. The man who was with you wasn't a surveyor?

A. No; I called his attention to the fact to notice the first direction of the reef.

Q. And the sun you say being south at twelve o'clock and this was at two o'clock, and at that time was that reef east or west of a line drawn towards the south from the point on that rock?

A. It was west.

Q. West. Mr. Alexander had called your atten-

(Testimony of H. P. N. Birkinbine.)

tion to the map that was in evidence, that was made by Mr. Hill, at the last trial of this case, hadn't he?

A. Yes.

Q. And stated that he thought this trap was not correctly stated on the map? A. Yes.

Mr. WINN.—Well, that is hearsay.

Mr. CHENEY.—Simply an expression of the reasons why he measured that. I don't see why it is objectionable.

Q. Now, I will ask you about the measurements of water, Mr. Birkinbine. Are these figures that were placed here on your map by yourself were they made from actual measurements of the water at the time you were there? [516]

A. They were.

Q. And how were these measurements taken, with a rope, or with a rope, heavy line or steel tape?

A. I had a regular sinker that they regularly have for it, they use for soundings, on to the end of my tape fastened with a piece of wire. Then, I measured the distance from the boat and the sounding, set the zero on my tape, and saw it was two and a half feet there, I added two and a half feet of water in my readings.

Q. Did you read the tape yourself? A. I did.

Q. And you made notes of the actual measurement as it was?

A. As we went along in the boat.

Q. Now, you heard Mr. Hill testify that when he made the soundings which appear on this map, Plaintiff's Exhibit "D," that someone went in a small



(Testimony of H. P. N. Birkinbine.)

boat and when about every forty feet they made a sounding with a heavy line? You heard that statement? A. Yes, sir.

Q. Well, now, how did you make the soundings, Mr. Birkinbine, that you represent here by the figures 13.2, 19.2, 23.3, 25.8, between the trap and the point of the peninsula—how did—how did you make those so you could place them on the map with some degree of accuracy?

A. The boat kept in a line with the face of the trap, what you call the face of the trap, then this way—

Q. Yes, towards Chatham Straits?

A. Yes, and you could keep yourself on that line by eye along the face of the trap; and the angles were turned from this point after the sounding was taken and would have an intersection with this line. All of those angles were [517] from corner No. 1 of the claim, giving the positions of the different soundings.

Q. You say the soundings were turned, you mean with your surveying instruments?

A. With my transit.

Q. And you did it yourself?

A. I did it myself.

Q. Now, what do these figures I have just read, 13.2 and the rest of those figures between the trap and the point of the peninsula represent, that is what stage of the tide there, what tide?

A. They represent the fact the peninsula was at below extreme low tide, I don't recall the date of

(Testimony of H. P. N. Birkinbine.)

the lowest tide, I picked out the lowest one in the book, sometime in June, I think, in the middle of June, I think it was.

Q. This don't represent the actual measurements of water that you made on the 17th or 16th and 17th of February?     A. Oh, no.

Q. That is the number of feet?     A. Oh, no.

Q. Just explain that to the Court; that is, I am afraid some of us don't understand it; I know I don't.

A. Well, the measurements I took on that day, on that date, has subtracted from it the distance that the water was above the extreme low tide at the time the sounding was made, in order to get the least possible distance—the least possible amount of water that there could be.

Q. At extreme low tide?

A. At extreme low tide, yes, sir.

Q. Did you use the tide book in figuring that?

A. I did.     [518]

Q. And also in figuring the measurements that you have here represented by the figures 4.9 at the last lead pile towards the shore,—and what is that?

A. That is 12.4.

Q. 12.4 and 17.4 along that lead indicated by the black piles, and the figures—were they determined in the same way, Mr. Birkinbine?

A. Yes, determined in the same manner, all below extreme low tide.

Q. Then, I will ask you that according to your calculation is this trap of Mr. Alexander's as you

(Testimony of H. P. N. Birkinbine.)

show it on that, on the 16th and 17th of February of this year, including the last pile in the lead, is the entire trap below extreme low tide in front of Barron's Survey 804?      A. Yes, sir.

Mr. WINN.—Don't anybody dispute that, the way it stands there.

Mr. CHENEY.—I think some of your witnesses denied or disputed it, some of them said, Captain Mason said that appeared to be out on the tide ground.

Mr. WINN.—Said to be a foot and a half or two feet at low tide.

Mr. CHENEY.—Yes, and said on the June tide would be bare ground, I understood him to say. Anyway, that is immaterial.

Q. Well, now, Mr. Birkinbine, I will ask you if you examined the shore that is the beach along the front of this survey number 804 and went upon the ground there and examined the cabin and the other things that are shown here on this map?

A. Yes, I did.

Q. Did you walk from one end of the survey to the other?      A. Yes. [519]

Q. I will ask you this question, whether it is possible for a person to walk at ordinary high tide from this—from this low part of the claim on the west end of the claim to the low part of the ground on the east end of that claim?

A. Well, I did walk from one end to the other of the claim at about high water or possibly—I don't recall exactly whether it was exact low water or I

(Testimony of H. P. N. Birkinbine.)

suppose, well, after high water, from one end of the claim to the other, that is I traveled from corner No. 1 to the intermediate meander point and then to corner No. 2, and then I think it was about an hour after the high tide, that happened sometime in the middle of the day of February the 18th, I think it was.

Q. When did you make your surveys now?

A. Well, I just—

Q. You can refer to that memorandum you have.

A. No; it was the 17th; the survey was made the 16th and 17th; however, think it was the 17th.

Q. That was on the 17th?

A. That was on the 17th.

Q. Was you carrying your instrument?

A. Yes.

Q. And you walked all along this shore within an hour of high tide, that is the whole length of the claim?     A. Yes.

Q. Then, did you observe the formation of the ground as to rocks or sand or anything on the beach there along the front of that survey?     A. Yes.

Q. You have heard a place herein testified by plaintiff's witnesses to be sandy beach; now, will you explain to the Court what you found in the way of a sandy beach there [520] over on the west end of that claim?

A. Well, I wouldn't say it is what I would term a sandy beach. There are a few places where the water has washed some sand behind or beside the big rocks; well, a big rock where the sand has settled,

(Testimony of H. P. N. Birkinbine.)

but I wouldn't call it a sandy beach.

Q. What is the nature of the shore along here below the extreme high tide line—what is the general nature of the shore along there, Mr. Birkinbine, that is, as to rocks?

A. I would say it would average from rocks as big as your fist to rocks as large as, well, of course, there are some great big boulders there and would be difficult for a man to climb up on top of them, but I should judge the whole thing will not average boulders as big as both of your fists.

Q. Boulders?

A. Boulders, we will say about six rocks, six inches, rather, well, about at six then the average.

Q. Some large boulders?

A. Yes, large boulders, with the exception of this place where I have described the portion here which might be described as a rock outcropping.

Q. Now, Mr. Birkinbine, you heard Captain Mason testify, did you—you were in the courtroom?

A. Captain Mason? He is captain of the "Anna Barron"?

Q. Yes, captain of the "Anna Barron"?

A. Yes.

Q. You heard him state that there was a high bluff extending along the water and towards the east end line of survey 804, within two or three hundred feet of this east end line—a precipitous steep, bluff along there. Now, I will ask you if you—if you observed the ground there on that waterfront—can



(Testimony of H. P. N. Birkinbine.)

you testify whether that is a fact what— [521]

A. The bluff stops right about where I have placed this little cross—asterisk. I probably located the bluff and set a point somewhere in here, I think right about here at the edge of the bluff, and there is another set right about here at the edge of the bluff, in order to fix the limits of the bluff.

Q. What kind of ground is out to the eastward of that and toward the end line of that claim, that is with reference to being a precipitous bluff—or is it a sort of low beach?

A. Well, it is—it rises from the—from tide water back to—I don't know just how to describe it; of course, it isn't like this rock outcropping, but it rises on possibly a ten or fifteen per cent grade, speaking very roughly, and doesn't seem to be the outcropping that occurs right where I have marked with a little asterisk.

Q. That is over near—

A. Yes, around that rocky point.

Q. I will ask you if you took any photographs of that east shore of that claim? A. I did.

Q. What? Did you take any of the other?

A. I did.

Q. West end of the claim? A. Yes.

Q. When did you take those photographs?

A. On the 17th of February.

Q. I hand you a photograph here and ask you what it is?

A. That is taken from the east end of the claim. You will notice the point marked "Photograph 1";

(Testimony of H. P. N. Birkinbine.)

I think it is one and two taken looking towards the south.

Q. Well, now, just step up here.

A. One moment, Mr. Cheney; I would like to inform the Court [522] that the films when these pictures were taken, it is one of these panorama cameras that the lens swings around, you see, you take the picture, and really to get the true value of one of these pictures should be held on a slight curve, like that.

Q. Now, did you take this picture yourself?

A. I did.

Q. Well, you said what day you took it?

A. Yes, on the 17th.

Q. And what hour was it taken?

A. Well, that says eight-thirty; I think about eight-thirty; I don't remember.

Mr. JENNINGS.—Is it marked on the exhibit where that picture is taken from?

Mr. CHENEY.—Yes, sir.

A. Yes.

Q. (By Mr. CHENEY.) Please point out to the Court, Mr. Birkinbine, just where that picture was taken from.

A. Picture one and two were taken from here, I took two pictures in order—

Q. One and two are identical?

A. Possibly a little difference, in rolling the film may have thrown the camera a little.

Q. Why did you take two?

A. To be sure of a good one.

(Testimony of H. P. N. Birkinbine.)

Q. (By the COURT.) Where did you say you stood?

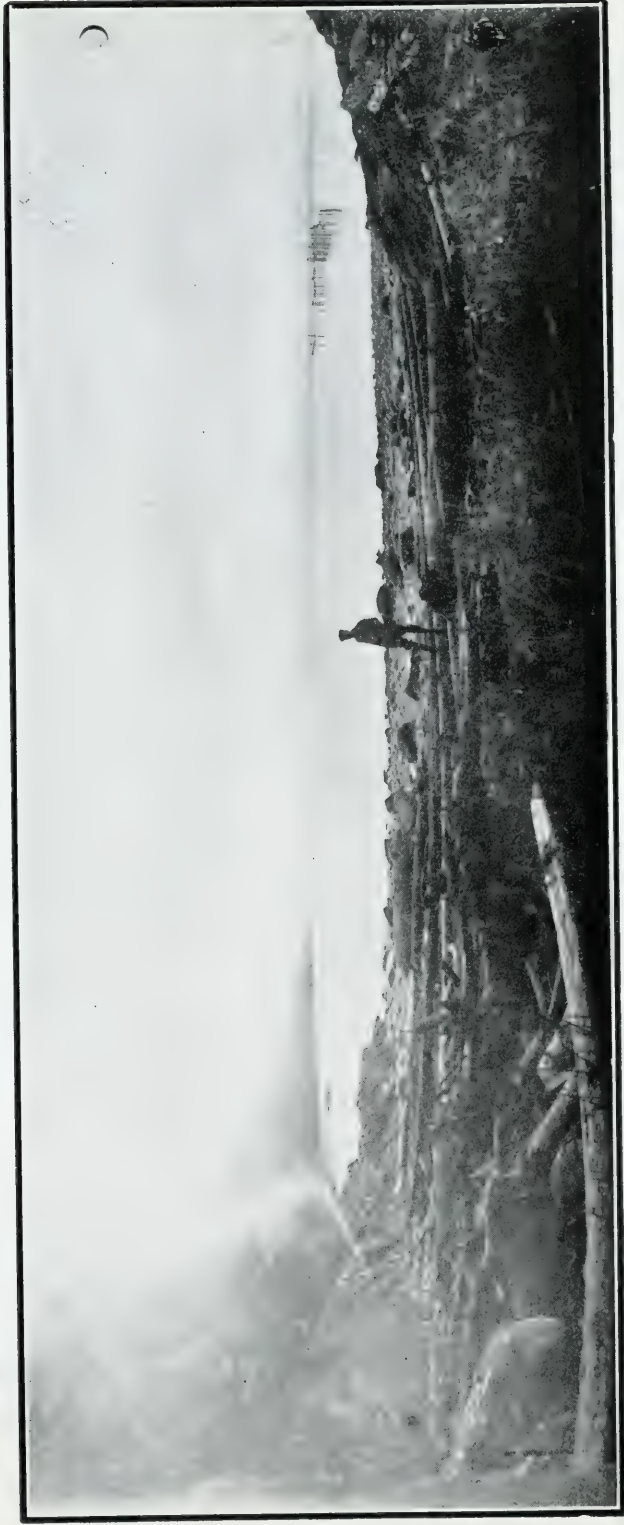
A. At number one and two, you see the little cross?

Q. How far from the end line?

A. That—wait till I get the scale. It is forty feet from the end line, sir.

Q. (By Mr. CHENEY.) And how far is it from the meander line, [523] Mr. Birkinbine, with your instrument?

[Defendant's Exhibit No. 5.]



[Endorsed]: No. 1, Feb. 17, 8:30 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 5. Recd.  
in Ev. R. E. R. [524]

(Testimony of H. P. N. Birkinbine.)

A. Seventy feet; no, it is eighty feet.

Q. Eighty feet from the meander line of survey 804-B? A. Yes, sir.

Q. Was where that picture was taken there where it is indicated by the cross and marked on the map "pictures 1 and 2"? A. Yes.

Q. And you say one and two are identical?

A. One and two are identical.

Q. That is taken from the same place at the same time?

Mr. JENNINGS.—Haven't introduced the picture.

Mr. CHENEY.—I want to introduce them there just the same.

Q. (By Mr. JENNINGS.) That is a correct photograph, is it? A. Yes, sir.

COURT.—They may be received.

Mr. WINN.—We object to that picture, if your Honor please; it is deceptive, misleading, as the evidence shows, from the stand already, the way the picture was taken.

COURT.—Objection overruled.

(Defendant's Exhibit 5 received.)

Q. (By the COURT.) How much of an area is included in that picture?

A. About two hundred and seventy feet to the limits of that bluff, the camera is supposed to include, I think, it is eighty degrees; that would be, well, possibly that far, sir.



(Testimony of H. P. N. Birkinbine.)

Q. Well, I have reference to how much shore of this survey does it cover, does it expose—how much of the shore line of the survey?

A. To about there, sir, just includes a portion of the bluff.

Q. Yes, I understand.

Q. (By Mr. CHENEY.) Now, did you take any more pictures, [525] Mr. Birkinbine, on that day?

A. Yes, sir.

Q. Now, you have marked on that map over on the west end of the claim a little cross there, pictures 3 and 4? A. Yes, sir.

Q. Well, those pictures 3 and 4 are identical?

A. Yes, sir, they are both identical.

Q. I hand you a photograph and ask you if you took that photograph on that day? A. I did.

Q. And what is the number you have on that photograph? A. This is No. 3 taken on the same day.

Q. And was that taken from the spot marked with a cross "Pictures 3 and 4"? A. It was.

Mr. CHENEY.—I offer it in evidence at this time, your Honor.

COURT.—Any objection?

Mr. WINN.—Same objection to it, your Honor.

WITNESS.—Your Honor, I would like to explain the reason for—that this is really—these pictures are a little deceptive unless you hold them a little that way; you will notice when you hold it straight there is a little curve visible on this long log here; if you don't hold the picture on a slight curve with the sub-

(Testimony of H. P. N. Birkinbine.)

ject away from you would make it appear as though the log were curved and as though the beach line were somewhat more of a curve.

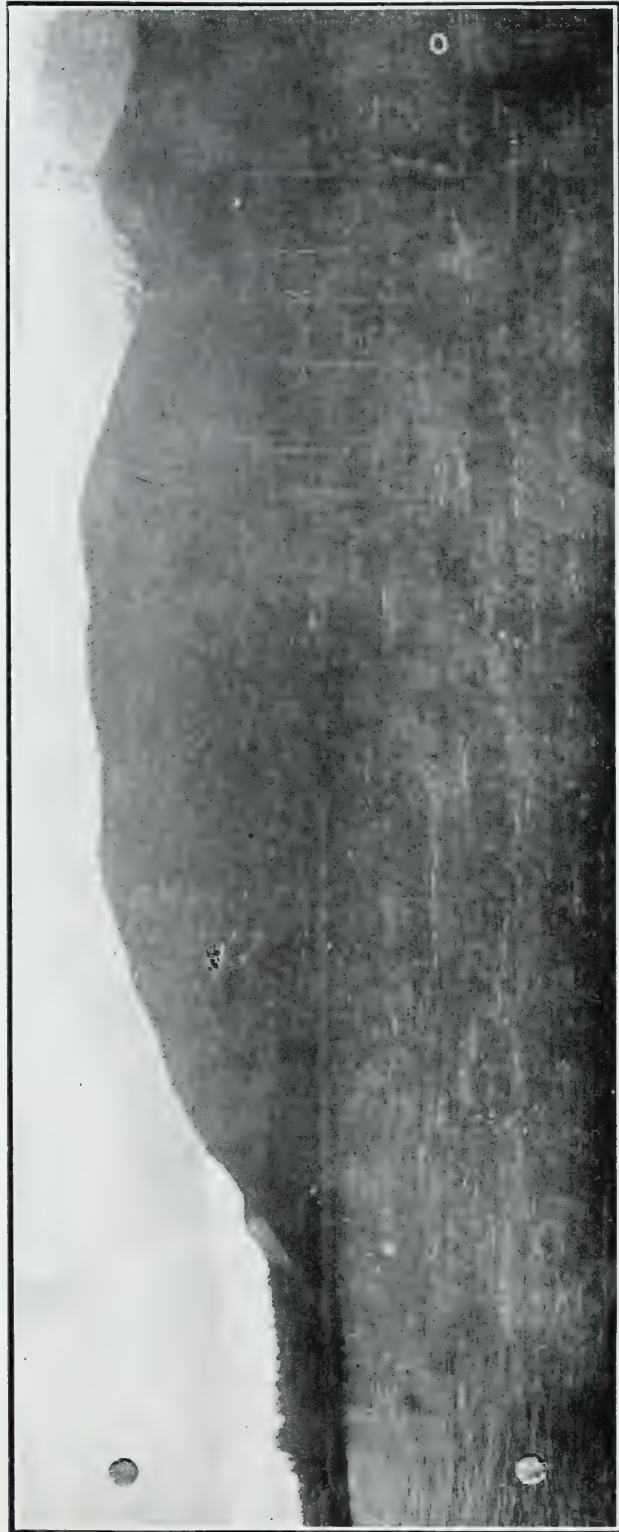
COURT.—You offer it in evidence?

Mr. CHENEY.—Yes, sir.

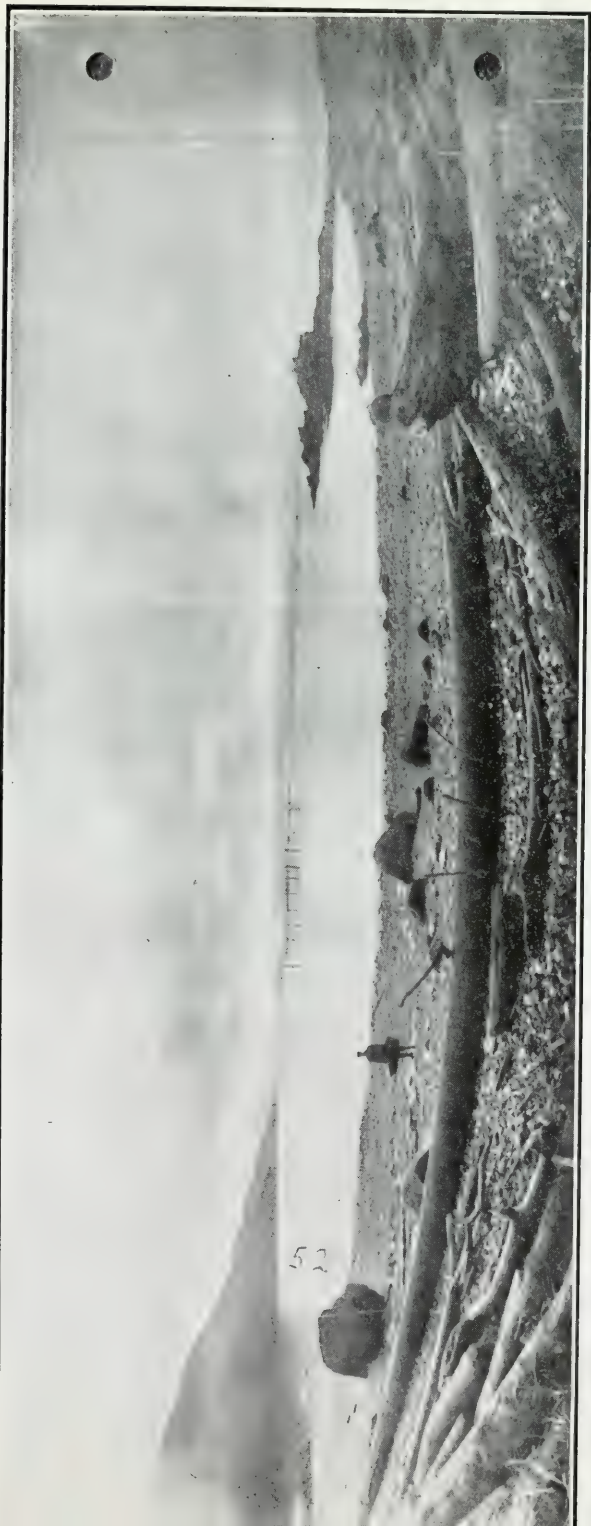
COURT.—It may be received.

Mr. WINN.—Same objection. [526]

[Defendant's Exhibit No. 7.]



[Endorsed]: No. 5, Feb. 17, 9:30 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 7. Reed.  
R. E. R. [527]



[Endorsed]: No. 3, Feb. 17, 9:00 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 6. Recd. E. R. [528]

(Testimony of H. P. N. Birkinbine.)

COURT.—Same ruling.

(Defendant's Exhibit 6 received.)

COURT.—Proceed, gentlemen.

Q. (By Mr. CHENEY.) I hand you another photograph, Mr. Birkinbine, and ask you where that is taken from and if that is shown on the map, the exact—

A. That is taken from—

Q. —the place where it is taken from?

A. It is taken from the northwest corner.

Q. Of the spiller? A. Of the trap.

Q. Of the trap?

A. Marked "Picture 5," from right over the top of that piling.

Q. And that is taken looking towards the land?

A. Looking northwards towards the land. The picture is very dim, can't see scarcely anything on it; of course the piles have some motion and I had to take—

Q. Is that the same?

A. No, that is not the same.

Q. O, yes, I see; that is a picture of—I offer it in evidence—these are all taken on the same day?

A. All taken on the same day.

Q. All taken by yourself?

A. By myself, yes, sir.

COURT.—Just a moment.

Mr. WINN.—He hasn't marked this one. If you want it marked. Same objection to it.



(Testimony of H. P. N. Birkinbine.)

COURT.—May be received, and objection overruled.

(Defendant's Exhibit 7 received.)

Q. (By Mr. CHENEY.) I hand you another photograph, Mr. Birkinbine, and ask you if you took that photograph on that [529] same day?

[Defendant's Exhibit No. 8.]



[Endorsed]: No. 6, Feb. 17, 9:45 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 8. Reed.  
in Ev. R. E. R. [530]

(Testimony of H. P. N. Birkinbine.)

A. I did.

Q. And is the point that was taken from represented on that map and if so how is it represented?

A. That position is approximate.

Q. Just point out to the Court, then, where it is represented so it will be represented in the record.

A. The position is established at the point marked location picture 6. I, of course, couldn't manipulate myself and be upon shore to triangulate at the same time.

Mr. CHENEY.—Now, I offer it in evidence and ask that it be marked.

WITNESS.—That picture looks northerly.

Mr. WINN.—Same objection; incompetent, irrelevant and immaterial for any purpose, your Honor.

COURT.—It may be received. Objection overruled.

(Defendant's Exhibit 8 received.)

Q. (By Mr. CHENEY.) I hand you another photograph marked No. 7, and ask you if you took that photograph? A. I did.

Q. And is the place you took it from marked on the water in front of the survey?

A. Yes, it is marked approximately.

Q. What is the mark on the map here, Mr. Birkinbine?

A. It is a cross and opposite the cross is marked "Approximate location picture 7 and 8." Both 7 and 8 were identical.

Q. All these are identical?

(Testimony of H. P. N. Birkinbine.)

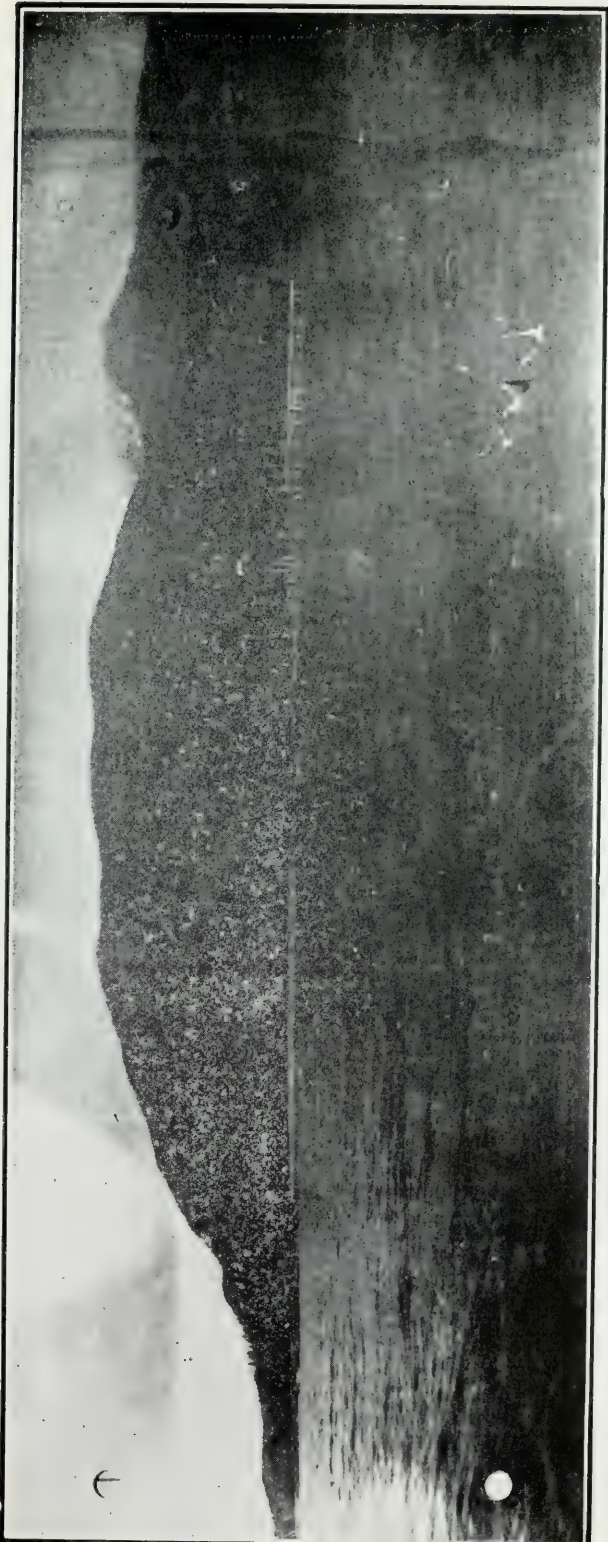
A. The picture looks northerly.

Q. (By COURT.) It looks northerly you say?

A. Yes, sir, that is right in here, sir, northwesterly, northeasterly.

Q. How is that? [531] A. Northeasterly.

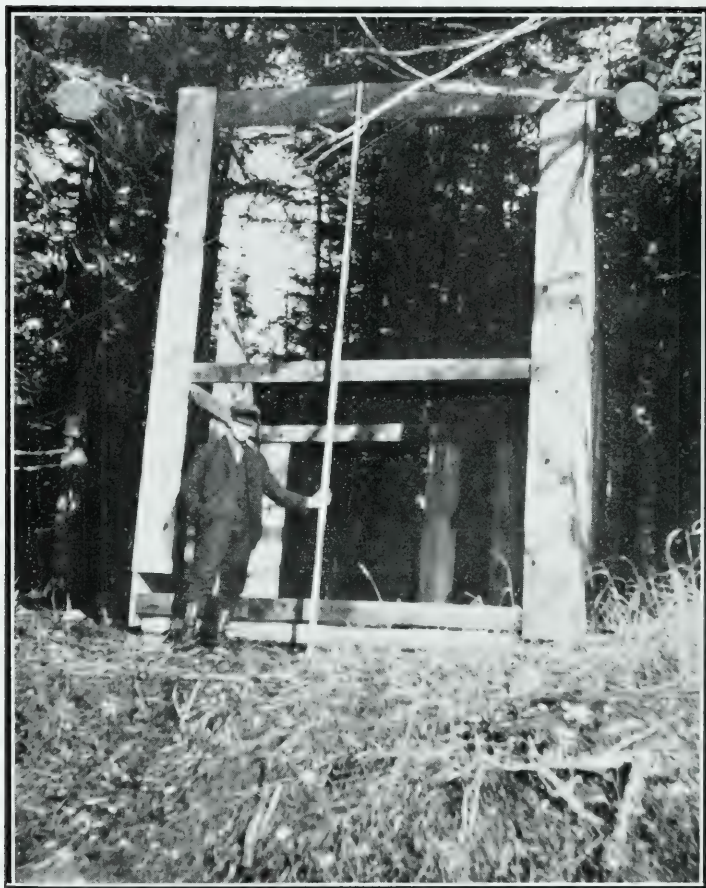
[Defendant's Exhibit No. 9.]



[Endorsed]: No. 7, Feb. 17, 10:10 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 9.  
Recd. in Ev. R. E. R. [532]



[Defendant's Exhibit No. 10.]



[Endorsed]: Nos. 1-A & 2-A., 10:20 A. M., Feby. 17, by H. P. M. B. Barron vs. Alexander. Defts. Ex. 10. Recd. in Ev. R. E. R. [533]

(Testimony of H. P. N. Birkinbine.)

COURT.—I see. Offer it in evidence? Any objection?

Mr. WINN.—Same objection.

COURT.—May be received and objection overruled.

(Defendant's Exhibit 9 received.)

Q. (By Mr. CHENEY.) Mr. Birkinbine, did you visit the cabin that Mr. Barron has there and it has been testified to here on this trial on the beach?

A. I did.

Q. On the land. Did you take a picture of that?

A. I did.

Q. I hand you a photograph here and ask you to identify it and state what it is?

A. It is a picture taken from immediately in front of the cabin; one of the assistants was helping me hold a fourteen foot level rod in front of the cabin.

Mr. CHENEY.—I offer it in evidence.

Mr. WINN.—Same objection, if the Court please.

Q. (By Mr. CHENEY.) Taken by you?

A. Taken by me.

Q. That is you took it yourself?

A. On the same day.

COURT.—It may be received. Objection overruled.

(Defendant's Exhibit 10 received.)

Q. (By Mr. CHENEY.) I hand you another picture showing the formation of the shore there, Mr. Birkinbine, and ask you if you took that picture?

A. I did.

Q. On February the 17th, the same day?

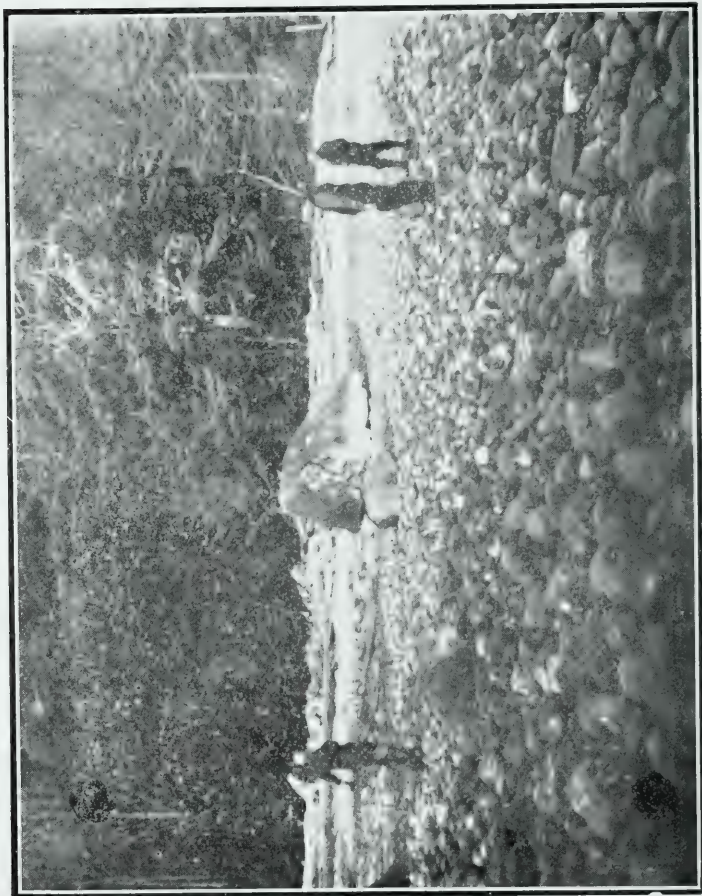
(Testimony of H. P. N. Birkinbine.)

A. Yes.

Q. And what, if anything, does that—

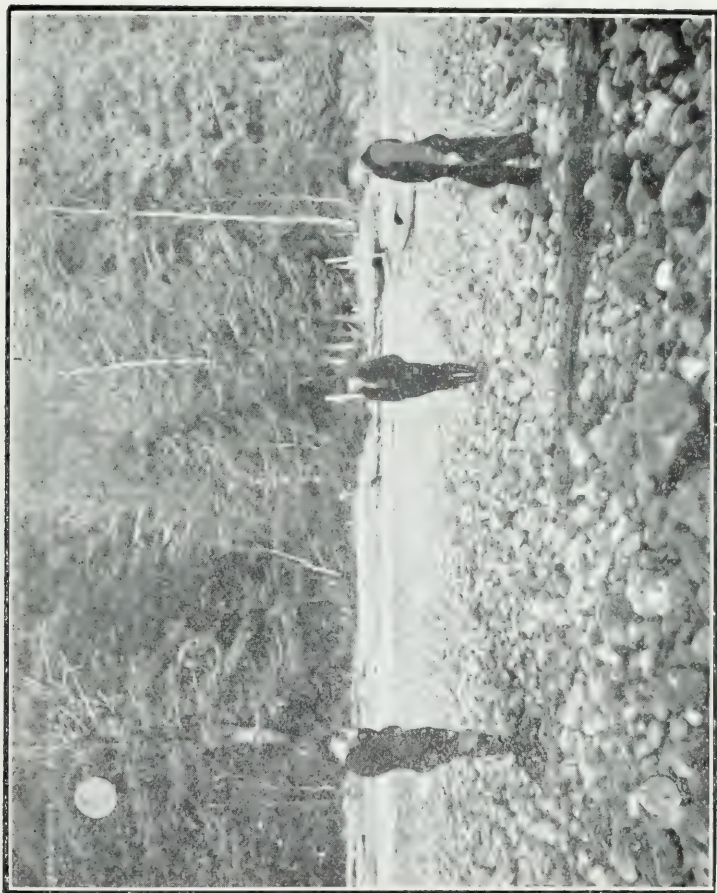
Mr. WINN.—Let me see it. [534]

[Defendant's Exhibit No. 12.]



[Endorsed]: Nos. 5-A & 6-A., 4:25 P. M., Feb. 17,  
by H. P. M. B. Barron vs. Alexander. Defts. Ex.  
12. Recd. in Ev. R. E. R. [535]

[Defendant's Exhibit No. 11.]



[Endorsed]: Nos. 3-A & 4-A., 4:20 P. M., Feb. 17,  
by H. P. M. B. Barron vs. Alexander. Defts. Ex.  
11. Recd. in Ev. R. E. R. [536]



(Testimony of H. P. N. Birkinbine.)

COURT.—You may see it before it is offered in evidence if you want to, Judge Winn.

Q. (By Mr. CHENEY.) What, if anything, does that represent with reference to the bedrock along the shore of the west end of this claim towards the water?

A. Well, it only shows a little bedrock, that is taken, I was standing about in the position of the “E” in that “South 79 150 E.” I was standing in the position of the “E,” I was looking towards the east. It shows the bedrock only one place as the man in the picture is standing on the visible bedrock.

COURT.—Offer it in evidence?

Mr. CHENEY.—Yes, offer it in evidence.

COURT.—Object to it?

Mr. WINN.—O, no, sir.

COURT.—Very well, it may be received.

(Defendant’s Exhibit 11 received.)

Mr. CHENEY.—I have several more.

Q. I will ask what that is, Mr. Birkinbine?

A. It is another picture showing the bedrock outcropping which showed up on the southeasterly side of the claim on the beach, shows the character of the beach. Each man in that picture is standing on bedrock.

Mr. CHENEY.—I offer it in evidence.

COURT.—It may be received.

Mr. WINN.—Let it go.

(Defendant’s Exhibit 12 received.)

Q. (By Mr. CHENEY.) Now, Mr. Birkinbine, you said you had some experience in the construction



(Testimony of H. P. N. Birkinbine.)

of wharves. You stated what— A. Yes.

Q. —your experience had been. You ascertained the formation of the ground there, did you?

A. Yes. [537]

Q. Along the shore of that claim and you took these pictures? A. Yes, sir.

Q. Now, I will ask you, Mr. Birkinbine, if it is a fact as Captain Mason testified that the water is deeper over on the eastward side of this trap as shown on Plaintiff's Exhibit 4, or Defendant's Exhibit 4, deeper there than it is along that front we will say about the center here over towards the east end line of that claim than it is over in this part in front of the west part of that claim, and knowing the formation of the ground and shore along the meander line of that survey, where, in your judgment, would be the most feasible place to build a wharf in front of this survey if you want to build one?

Mr. WINN.—Object to the question as incompetent, irrelevant and immaterial, no foundation laid for the question and not a proper hypothetical question.

Mr. CHENEY.—It is not a hypothetical question.

Mr. WINN.—I don't know where he has ever built any wharves in salt water and has done any soundings for it; if a man can go along on the shore and look at the shore and tell where a place to build a wharf is he must have a greater insight under the water upon which he didn't do any soundings than he can say what found out about the formation the bottom as described by Captain Mason, and then I

(Testimony of H. P. N. Birkinbine.)

presume as described by our witness, Mr. Alexander, that is in the record of the soundings; they could I presume make some inquiries and so forth, but as to how they made those soundings—but now here they put a witness on the witness-stand who has never built a wharf out in the salt water any place in the ocean.

Mr. JENNINGS.—He has too. [538]

Mr. WINN.—He has testified he drove some piles at Baltimore.

Mr. CHENEY.—It is uncalled for.

Mr. WINN.—I don't care *whether object* to it, absolutely no foundation laid for it, if your Honor please. That won't aid you, his testifying about that. Wouldn't your Honor be in just as good a position to make a guess about this proposition?

Mr. JENNINGS.—Do you object because he has not qualified?

Mr. WINN.—Well, I object to it on the ground, I have just announced my objection.

Q. (By Mr. JENNINGS.) Did you ever build any wharves, Mr. Birkinbine?

A. I have had charge of them.

Q. Do you understand how to build a wharf?

A. Why, I think I do, Mr. Jennings.

Q. Have you driven piles, had charge of driving piles? A. Yes, sir.

Q. How many times? A. Well, more than once.

Q. Well, you testified at the start about that. Did you make any soundings?

(Testimony of H. P. N. Birkinbine.)

Mr. CHENEY.—The Court doesn't want you to go over that again.

COURT.—It is my recollection the witness testified—if he has had any experience in that line he is competent to testify.

Mr. WINN.—I suppose it is a matter of weight.

COURT.—The weight to be given his testimony, the weight of the testimony, but where the witness is not an expert wharf builder, not necessary for a man to be an expert builder.

Mr. WINN.—They took it by soundings; he hasn't testified south [539] of this side; he has sounded out in here, the only place he has sounded.

Mr. CHENEY.—That isn't the only place he has sounded.

Mr. WINN.—Well, he hasn't testified.

Mr. CHENEY.—Well, if the Court please, I will ask, I will base this question on the testimony of Captain Mason who did sound over in here and tested the water for depth. I am not asking the witness about the depth of the water here. I am asking the question and basing it right on the testimony of their own witness, he so testified.

COURT.—He may answer.

Mr. WINN.—Allow us an exception?

COURT.—Yes.

Q. (By Mr. CHENEY.) Do you understand the question?

A. Yes, I think I understand the question; in fact, you want me to answer from someone else's testi-

(Testimony of H. P. N. Birkinbine.)

mony as to the water being deeper on the eastern side?

Q. Yes, sir.

A. —of the trap, and to my own of the beach from we will say ordinary low tide—I have never seen it at extreme low tide, that is extreme low tide line, I have located some soundings—the ordinary low tide to extreme high tide from my personal knowledge of the beach?

Q. Yes, sir. Your own knowledge of the whole situation there and the beach on the testimony of the plaintiff in that case which is that the water is deeper on the eastward side of the trap than it is on the westward where you made your soundings?

A. Well, of course, first, upon the captain's testimony that the water is deeper on the eastern side, then, would mean that you would reach deep water quicker with a wharf than you would from the western side of the claim, that is, this place. [540]

MR. WINN.—I object to burdening the record with that kind of circumstantial evidence.

MR. CHENEY.—I object to your interrupting the witness when testifying.

COURT.—Now, gentlemen; counsel has a right to object if he wants to object.

MR. CHENEY.— —when the witness is in the middle of the answer. Why don't he object to the question?

A. It may be wrong, your Honor.

MR. WINN.—I am objecting to it honestly.

A. It may be wrong, but the way I have explained,

(Testimony of H. P. N. Birkinbine.)

it would be that his pot is now—

COURT.—All right, go ahead.

A. Well, with regard to the wharf from extreme low tide to average low tide, I would say that the eastern side would be the better because of the greater expense, would be very likely to strike, on account of the bedrock that crops out on the west side of the bluff would make it impossible to drive piles; of course, you can set a wharf up there and weight it down.

Q. (By Mr. CHENEY.) Well, Mr. Birkinbine, come right down to actual facts, is the question, when you are considering building a wharf, is the question in considering the length of a wharf to be taken into consideration when you deal with the expense of a wharf? A. O, yes.

Mr. WINN.—Object to the question as circumstantial evidence and burdening the record.

Q. (By Mr. CHENEY.) I will ask you if the holding ground is the same both in front of the eastern portion of Mr. Barron's homestead location 804 and the western portion, if the holding ground for piles is the same, we will say, for the [541] purpose of this question, and the water is deeper in front of the eastern portion of the claim, where would be the feasible place to build a wharf extending out from that homestead survey, in your judgment?

A. East of the outcropping,—that is on the eastern side of the claim?

Q. How long, in your opinion—just as an approximation—would a wharf have to be to come out to



(Testimony of H. P. N. Birkinbine.)

deep and navigable water here if it was built from, we will say, to midway between this rocky point here in the center of the survey number 804 and corner number one and to be sufficiently high-water line to make a wharf—what would be the approximate length of that wharf?

Mr. WINN.—Same objection; incompetent, irrelevant and immaterial.

Mr. CHENEY.—I don't care for exact figures.

Mr. WINN.—Well, immaterial; no foundation laid for witness to answer the question.

COURT.—Well, if the witness knows he can say whether it is necessary to extend the wharf in order to reach deep water, he may answer the question if he knows. Answer the question, Mr. Birkinbine, if you know how far the wharf may have to extend in order to reach deep water.

Mr. WINN.—Another thing, these questions are not based upon any purpose. I suspect, of course, if a man is going to build a wharf he may build it at some place maybe wouldn't cost him fifty dollars and not be a bit of use to him, or maybe in order to build it where it could reach out and use it might cost him several times that much. And further, if Mr. Birkinbine has taken any soundings he knows he can't [542] extend that except as testified to.

COURT.—Well, now, Judge Winn, counsel puts the question to him, assuming the testimony of your people to be true, that is, with reference to the east side of the trap, he testifies from your testimony accepting it as true, and then with his own informa-

(Testimony of H. P. N. Birkinbine.)

tion concerning the physical features of the ground. If you can't prove everything by one witness you may have one expert on wharves, another an expert on steamboats. But it is material to know how far you have to extend the wharf in order to get to deep water. Now, that is one phase of the question. It may be that you can show that a wharf there would be useless, but that is one thing to be proved.

Mr. WINN.—Then, if he is basing it, if your Honor please, upon Captain Mason's testimony, he is basing on the testimony that he couldn't put a trap in here at all because couldn't drive piles—it is based upon that.

COURT.—That part he is basing upon his own actual observations; the water he is accepting from your witnesses.

Mr. WINN.—I think his testimony, your Honor, is so meager, wouldn't be of any help in the world.

COURT.—Well, I think his testimony is competent with the testimony that has been offered by the plaintiff.

Mr. WINN.—I don't care, your Honor, if the Court thinks it is material.

Q. (By Mr. CHENEY.) You can answer the question.

A. The question was, how long would a wharf be on the west side, Mr. Cheney?

Q. Why, approximately, from the place where the plaintiff's witnesses testified it should be built, say, about midway between this rocky point and corner No. 1?

(Testimony of H. P. N. Birkinbine.)

A. There is only one way I can get at the depth of that, [543] Mr. Cheney.

Q. Well, I am not asking you to be absolutely accurate to the inch or a foot or even feet, the best answer you can make.

A. I would say four hundred and eighty feet.

Q. And what proportion as near as you can state, Mr. Birkinbine, what proportion of that would be over this rocky ground where the pictures that have been introduced here of the bedrock—what proportion of that would be over that kind of ground, that is about what proportion of that distance?

A. Mr. Cheney, I couldn't say below the boulders that would be possible to place a wharf there and that only one bent would be on the bedrock, at least would top it so far as could see; of course, we might assume there was bedrock that slid off under the boulders, but I can't swear to that.

Q. Well, I will ask you this: What proportion of it would be before you got to this, to navigable water for ordinary vessels, we would say, that would draw nine feet, ten feet—I want to get the facts, I want to get the facts for estimating what proportion of it if attached up here to the upland would the larger portion be over that shore there before you get out there to navigable water?

Mr. WINN.—Same objection. Allow me an exception?

COURT.—Same ruling. You may answer.

A. Why, I would say about a hundred and fifty feet would be over the part where you couldn't get

(Testimony of H. P. N. Birkinbine.)

sufficient penetration to hold the piles except by weights. Of course, it is possible to put a dock in like I believe, the Wrangell dock, I believe, is a weighted dock.

Q. (Mr. CHENEY.) Yes, it is possible to build a dock most anywhere, that is, by weights? [544]

A. Yes, sir.

Q. That is an estimate you are making now from your observations in front of that claim.

A. Yes, sir.

Q. You haven't tested every foot of the ground and don't make that as a statement of actual feet?

A. No, made no soundings.

Q. (By Mr. JENNINGS.) Mr. Birkinbine, you heard Mr. Hill's testimony that his map was made by triangulation and the use of stadia measurements?

A. Yes, sir.

Q. You testified that you didn't use a stadia?

A. No, I didn't use a stadia.

Q. Now what does that mean; what does "stadia" mean?

A. Why, it is permissible; and when looking in an instrument there are three cross-hairs in stadia as a rule. You only use the top cross-hair; that is the horizontal hair, and the bottom horizontal hair. Now, if there is one part of the rod visible between those two cross-hairs, that means that the rod is a hundred feet away from you, plus the focal length of the instrument, which is probably a foot and a half or a foot and a quarter, because these hair lines are set on a proportion as a rule, of course some instru-

(Testimony of H. P. N. Birkinbine.)

ments are different—as a rule on a proportion of one to a hundred.

Q. Well, what is wrong with stadia measurements, Mr. Birkinbine? Aren't they used?

A. Well, of course, it is—

Q. They are not accurate, are they?

Mr. BURTON.—Object to the question as leading.

COURT.—The question is leading.

Q. (By Mr. JENNINGS.) Are they as accurate as triangulation?

A. O, of course, they are not as accurate as triangulation, [545] that is when triangulation is done several ways.

Q. Well, now, I just want to ask you a question; I don't care whether you answer it. A. Yes, sir.

Q. I just want to know for information—stadia measurements, are they under ban or prohibited, or how are they calculated in surveying?

A. Well, of course, stadia measurements are not permitted by the regulations of the Surveyor-general's office.

Q. Yes, the regulations of the Surveyor-general's office—United States deputy mineral and United States deputy land surveyors are forbidden to use stadia measurements?

A. I think where such cases as it would be impossible to triangulate and impossible to get a tape down a bluff or up a bluff and you would state so, that you took it by stadia, in your notes, they might under those conditions pass it.

Q. But otherwise not?



(Testimony of H. P. N. Birkinbine.)

A. I don't think they would.

Mr. JENNINGS.—That is all.

Whereupon court adjourned until 10 o'clock,  
March 20, 1912. [546]

10 o'clock, March 20, 1912.

H. P. N. BIRKINBINE, heretofore duly sworn,  
being recalled, testified further on behalf of defend-  
ant.

Direct Examination.

Mr. CHENEY.—If the Court please, I would like  
to ask the witness just one question in regard to a  
picture here.

COURT.—Very well.

Mr. CHENEY.—And then, I will be through.

Q. Mr. Birkinbine, I will ask you if you saw any  
improvements in the way of buildings of any kind,  
any kind of structures on this survey 804 with the ex-  
ception of this little fisherman's—watchman's shack,  
that you took the picture of as shown by exhibit,  
Defendant's Exhibit 10?

Mr. WINN.—Object to the question as leading and  
suggestive, and I don't know of this witness having  
testified anything about a watchman's shack. He  
said he saw a building there of some kind.

Mr. CHENEY.—Well, if the Court please, the  
matter, of course, has not been gone into so much  
on this trial but the original complaint in this case  
alleges that the plaintiff in this case—

COURT.—I don't care to hear any argument on  
the question. I think it is proper to show what there  
is on the upland, if there is a shack, whatever it is.

(Testimony of H. P. N. Birkinbine.)

Mr. CHENEY.—I was just going to say that they allege it was worth a hundred and fifty dollars, and had other improvements—gone into on the last trial. It is there alleged—

COURT.—In any event, I think it is competent to show what the plaintiff has on the property as one of the indexes of what he may desire to use it for—what he may need literal [547] rights for.

A. That is the only structure I saw on the—on the claim.

Q. (By Mr. CHENEY.) That is represented by the photograph that you took on what date, Mr. Birkinbine? A. On February the 17th.

Q. Well, let me get your answer fully, Mr. Birkinbine. Was there a structure of any kind in the nature of a fence or buildings or any kind of a structure on this survey 804-B with the exception of this fisherman's cabin or this cabin we will say that you have taken the picture of represented by picture 10?

Mr. WINN.—Object to the question, incompetent, irrelevant and immaterial for any purposes.

COURT.—He may answer. Objection overruled.

A. I didn't see anything that could be called a structure on any foot of the claim which I visited there; I visited, I think, practically the whole claim, there might be a square hundred feet or a square two hundred feet in the middle back portion which I didn't visit. I didn't run the back line.

Q. And you took this picture of the cabin?

A. I took that picture.

(Testimony of H. P. N. Birkinbine.)

Q. Shown by that exhibit, did you?     A. Yes.

Q. Well, I will ask you again—I asked you that before, but I will ask you if there was, if there is any part—any part of this fish-trap represented on Plaintiff's Exhibit 4, on Defendant's Exhibit 4, which is the map that you have drawn and testified to, if there is any part of that fish-trap above the line of extreme low tide or about the point that you have marked on your map, I think, a black spot there and [548] with the figures 4.9?     A. No, there is not.

Mr. CHENEY.—That is all.

Cross-examination.

Q. (By Mr. WINN.) You say you are a deputy United States mineral and deputy United States land surveyor, Mr. Birkinbine?

A. Yes, I hold both appointments.

Q. How long have you been holding those two appointments?

A. Two years last December, Judge. I don't remember the date of the commissions.

Q. How long have you lived at Haines?

A. It will be four years sometime in April.

Q. Have you been engaged in the surveying business extensively up there since you have been there?

A. In general engineering work and construction work as superintendent and assistant superintendent of construction for the Quartermaster's office and—

Q. You have been doing work over at the army post?

A. Yes, I was there for about two years after I

(Testimony of H. P. N. Birkinbine.)

first came here, and—

Q. And when Ed Webster was repairing the wharf up there, did you say you had charge of the work?

A. Yes, sir.

Q. When was that?

A. I think it was in the early spring of 1909.

Q. When, do you recall when the wharf was originally built?      A. No, sir.

Q. This work that you superintended for Ed Webster was repairing the wharf after it had been built? [549]      A. Yes.

Q. Now, how many wharves have you ever built? In Alaska?

A. You mean the entire construction from—

Q. Yes, sir. How many places have you gone out—      A. None.

Q. No. You never have gone out and found a location for a wharf and constructed the wharf out yourself?

A. No, nowheres; never have done the location, made the location surveys and had charge of the construction of the whole work on any one job.

Q. No, sir. And you stated to the Court what your experience had been, Mr. Birkinbine, in down in Maryland somewhere, you were doing a lot of piling across sloughs and swamps or something for railroad purposes, trestle work?

A. I stated that, in the States, yes, sir.

Q. Now, as I understand, neither in Alaska nor out of Alaska, Mr. Birkinbine, you never have passed as an expert wharf builder?      A. No, no.

(Testimony of H. P. N. Birkinbine.)

Q. And never have had the superintendency of the construction of a wharf either in fresh water or salt water, the wharf itself?     A. Yes, sir.

Q. In salt water?     A. Yes.

Q. Where?

A. From beginning to the end I had—I was superintendent of construction last year of the building of a wharf of the same size, a little different elevation and a little different arrangement, from Fort Ward, Washington, into Puget Sound.

Q. Last year? [550]

A. Yes, sir, last year.

Q. Well, this had been a wharf site before and there has been a wharf on the premises?

A. Yes, I didn't have anything to do with the location surveys of that wharf.

Q. I see, you had nothing to do with the location surveys there, you had nothing to do with the sounding out for the purpose of locating the wharf site originally?

A. No, I had a little to do in making a little extra soundings for some little extra parts of the wharf we were going to do; that is all the soundings I had to do on that wharf.

Q. How many surveys, United States Government surveys for soldiers' additional surveys have you made in Alaska since you have been a deputy?

A. Four.

Q. Where were they—on salt water?

A. Three of them.

Q. Border on salt water?



(Testimony of H. P. N. Birkinbine.)

A. I beg your pardon, there was only two of them bordered on salt water.

Q. Where were they?

A. They were at about halfway between Haines and the Chilkoot Canal, possibly a little nearer the Chilkoot Canal.

Q. Now, do you know what the rules and regulations are that you are governed by in making these surveys in regard to waterfront property?

A. Yes, sir.

Q. After you make your survey, before your survey is approved, is there any examination to be made by the Government in regard to the survey before it is approved by the Surveyor-general? [551]

A. Yes.

Q. By whom is that made?

A. At the present time it is made by Mr. Dupuy.

Q. That is the special agent that has been here that examines all these nonmineral surveys?

A. Yes.

Q. And they go and examine the ground, the land, and so forth, that has been surveyed that is proposed to be patented? A. Yes.

Q. Well, how is it, Mr. Birkinbine, in making those surveys, does the United States Government permit you to include in it any tide lands?

A. No, the lines that you are governed by, your meander line, must be on the ordinary high-tide line.

Q. And they don't allow you to patent what they call tide land property? A. No.

Q. Now, Mr. Birkinbine, how many times did you

(Testimony of H. P. N. Birkinbine.)

go out to this property in question?

A. I went on the—first we arrived on the 16th, that night I think we went back to Funter Bay, I am not very familiar with the map in that district, but I feel confident we went to Funter Bay that night and anchored for the night. The next morning, on the 17th, went back again. Then I happened to be doing some other work in that vicinity and we stopped in there just the 12th of March. The other two dates as a matter of fact was the business. Altogether three times.

Q. Three times. What work did you do when you first went out there?

A. When I first arrived on the ground the first thing I did was to set up—set my instruments up on meander corner No. 2 [552] and sighted towards corner—I will have to look at the map—towards corner No. 3 and turned the azimuth to the intermediate meander point in order to find the intermediate meander point so to get the tape out there, found a little cross on a solid rock at the meander point.

Q. Were any corners established along this waterfront survey? A. Yes.

Q. What corners did you find there?

A. I found meander corner No. 1, meander corner No. 2 and that intermediate meander point which is not termed as a corner.

Q. How were they constructed, the corner points?

A. Meander No. 2 is a boulder, I can't state the exact size, and cross on boulder; and meander No.

(Testimony of H. P. N. Birkinbine.)

1 is a boulder, the exact point marked with a cross and the regular markings are on it which are put on all official surveys.

Q. Which one is the post?     A. No. 1.

Q. Over here?

A. Yes, sir, the regular markings are on the others, yes, sir.

Q. Well, what was the one on No. 2?

A. There was a boulder, part of it was exposed and part of it is buried in the beach.

Q. And what was the meander corner down here?

A. The intermediate meander point, sir.

Q. Yes, sir.

A. I didn't mean to correct you but it is not really called a corner.

Q. It is a point, a stake there?

A. A cross on the boulder cut with a chisel.

Q. On the bedrock?     A. Yes, sir.

Q. That was there distinctly?     [553]

A. That was there distinctly.

Q. These corner posts were all there indicated?

A. Yes, sir.

Q. How were they constructed now? They had a four by four?

A. No, sir, they were crosses cut on a rock.

Q. All the corners were crosses cut on a rock?

A. Yes, sir; the intermediate point was a cross-cut on a bedrock outcropping.

Q. And these other corners, was there any of them ordinary white four by four stakes there?

A. O, no; no, sir.

(Testimony of H. P. N. Birkinbine.)

Q. It was what?

A. It was crosses on a rock, I should say that No. 2 was possibly eighteen by twenty-four inches square, not cut square, of course, but a foot high, twelve inches high.

Q. Here is the exhibit we have offered in evidence in this case which is called Plaintiff's Exhibit "A." You know what that is, don't you?

A. Yes, sir, I know what that is.

Q. Well, on this Plaintiff's Exhibit "E" which is offered in evidence we have got the line of ordinary high tide, the same in that map as it is in the official map, isn't it?      A. Yes, sir.

Q. Just the same as it is in the official map. How did you ascertain this high-tide line that you have indicated on this exhibit of yours?

A. Why, I first went to a point below here which I didn't—

Q. Now, when you say "below here"?

A. Below corner No. 1.

Q. Indicate something so it will show in the record.

A. Yes, of course, below meander corner No. 1 I took a pile which I thought was about the right elevation, not with [554] regard to ordinary high tide but with regard to the contour of the beach, to explain it the best, and we made out some distinctive mark there, I don't know what it was exactly but something I could come back to and I took and set my telescope to my instrument, leveled up a target on my rod so as it would read the elevation that was there; then my assistants went around the beach certain

(Testimony of H. P. N. Birkinbine.)

points at the elevation on the beach, not with regard to any distance from the claim or to the claim, the elevation that this elevation would start from as my datum was, and set points, they set twelve points from here.

Q. Well, from here—from where?

A. From opposite meander corner No. 2 to the point on the peninsula above the little “a” twelve points.

Q. That is you went to work and found points along the beach in front of this survey 804—

A. Yes, sir, each point set level with the other.

Q. —that was on a level with each other?

A. Yes, sir.

Q. And then you got those points also so they were on a level with the surface of the ground of what you call the reef down there, the little island-like reef?

A. No, sir, no, sir, they were not level with this island reef.

Q. But these on the beach were all on the same plane, are they?

A. Those points, twelve on the beach, were all on the same plane.

Q. But now what have you to say about this reef?

A. I didn't say anything about this reef down here, sir, yet.

Q. O, I thought you had your finger on it; well, go ahead and tell what else you did in regard to finding this high-tide line.

A. Well, sir, after we had all these points set up by level, we then turned a different angle from these



(Testimony of H. P. N. Birkinbine.)

different points to [555] all these different points around the beach, first from one or the other of these points and one from another, so that we had the cross from two places like that so in order that with the two crosses I could fix the position of each one of these points, that is, I set each one of these points by triangulation.

Q. What did you do all this for?

A. In order to locate the position of these points on my map, sir.

Q. Yes, but I say, how did you ascertain where the high-tide line is on the ground. Of course, I would have asked you afterwards how you placed it on the map, but since you have done so, that is all right.

A. Well, I meant to answer what you asked me, Judge.

Q. Now, then, how did you ascertain what the high tide line, and what is that second line on the high-tide line?

A. This second line I have called approximate average high tide, which is practically the same thing in other words as ordinary high tide.

Q. Well, how did you ascertain that—how did you ascertain how it ran on the beach—how did you know how to place them on the plat?

A. After getting the different elevations along here I then ascertained the height of the tide, the height of low tide for one day and the height of high tide for a day, that is so I had high tide, and I took levels from, one from where I have driven a stake at this low tide to where I had driven a stake at the high

(Testimony of H. P. N. Birkinbine.)

tide and checked my difference in the elevation of the two tides. I then got the extreme highest and extreme lowest and to the extreme low, zero, which gave me the elevations of the other extreme high tide.

Q. What days did you take particularly to—for this purpose [556] of this calculation?

A. For the extreme high and extreme low I took days sometime between the first and middle of June, I think, if I recall the date correctly.

Q. Have you got your data here so you can give me the exact date you took it?

A. Yes, I have got the tide-book here.

Q. Well, let's see the date; what date did you take it? A. June 16th, sir.

Q. June 16th?

A. Yes, after the middle of June.

Q. After the middle? A. Yes.

Q. You took that as the data to go by to aid and assist you in establishing the high-tide line on this property. What was the raise and fall of the tide at that place that day?

A. The rise and fall of the tide—I haven't got that data in my head.

Mr. CHENEY.—You can refer to your tide-book. He is talking about the tide-book.

A. No; this was the particular date and not on the 16th of June. Do you mean the 16th of June, Judge?

Q. Well, you have estimated high tide. I asked you what date you took to establish this high-tide line you have got on the map?

A. Extreme high tide?

(Testimony of H. P. N. Birkinbine.)

Q. Extreme high tide, yes.

A. I took the 16th of June?

Q. The 16th of June?      A. Yes, sir.

Q. What was the high tide, how high was the rise and fall that [557] day—that is, suppose you had a perpendicular wall there out at low tide, how high would the tide have risen on that wall?

A. The difference I figured 23.9.

Q. Where did you figure that difference from?

A. I figured it from the tide-book.

Q. 23.09?      A. Yes.

Q. Or 23.9?      A. 23.9.

Q. You figured that from what data?

A. From the data that is given in the tide-book; yes.

Q. Yes. The tide at what place—well, the tide-book don't give the tides rise and fall of any particular place?

A. Don't give at this particular place but I figured it at Funter Bay.

Q. Funter Bay. Then that is it?      A. Yes, sir.

Q. Now, then, just how after you got this data there did you get this line on the ground—you took your tide-book and took the 16th day of June, took the rise and fall of the tide at Funter Bay, you had that data—now, what else did you do in order to locate this line on the ground?

A. I took other elevations around here and determined where my extreme high tide would be and the distances from this line that I had continued to where I had determined the extreme high tide was in my—

(Testimony of H. P. N. Birkinbine.)

in my triangulations with regard to fixing these I measured from these points I had triangulated to for any other information that I could measure either up the beach or down the beach.

Q. I just don't understand it yet, Mr. Birkinbine.

A. Yes, sir. [558]

Q. Now, you have got the high-tide line indicated on this plat? A. Yes, sir.

Q. And, of course, you told me how you got it on this plat located correctly, but I want to find out how you located it on the ground up there or if it is transferred on the ground to the place—you have explained how it is done, but how did you get that particular point on the ground; what means of calculations did you take?

A. Why I have my—have my instrument set up here and the telescope leveled—

Q. Yes.

A. —and I turned the telescope, always keeping it leveled towards the rod and I would tell my assistant to raise his rod two or three feet or to whatever range the telescope showed it should be raised to get to the right elevation.

Q. Did you use a stadia for that?

A. No, not that I have any serious objections to the stadia in a great many instances.

Q. How did you get that low tide in?

A. The low tide line is the result of some soundings that were taken and the soundings are simply interpolated.

Q. Suppose you had two parallel planes?

(Testimony of H. P. N. Birkinbine.)

A. Yes, sir.

Q. Are there—take some part of your upper indications you have got as a high tide and extreme low tide; now, what would be the distance, probable distance between two parallel planes, provided that they tap the ground there at the same angle on each one of these planes?

A. The extreme low tide and the extreme high tide, the difference would be 23.9. [559]

Q. That would be the probable distance?

A. That would be the probable distance; yes, sir.

Q. And that was the way you located this?

A. That was the way I located this; yes, sir.

Q. You went down to the beach to this point which is called the extreme low tide, the place you have it marked there, then you located other points, this twenty-three and a fraction had an elevation off on the side of the hill—

A. Judge, just a minute.

Q. —above that extreme low tide?

A. No, I would like to explain if I can; I think—

Q. That is all right, I am asking how you got, how you got it, you go ahead and testify how you got it.

A. For instance, I would take a sounding here.

Q. When you say “here” put your finger on the line?

A. Just a little, about a quarter of an inch below the “T” of the “letter” approximately average low tide.

Q. Yes?

A. I would take a sounding there and find the ele-



(Testimony of H. P. N. Birkinbine.)

vation of the ground; now, I would—

Q. Elevation of the ground above what?

A. Elevation of the ground above this extreme low tide.

Q. Well, when you got this extreme low tide you was there, out there?

A. I am trying to tell you, Judge.

Q. Yes.

A. Now, after getting the elevation, we will say of two feet, above extreme low tide at this point I have just indicated, supposing we have another one up here forty feet above it, just four feet above extreme low tide, you see, sir, that means that the beach drops two feet in forty; then these [560] lines or figures, all the lines or figures with that ratio are located in the ratio of one foot to twenty, which is the same as two feet in forty, sir. As I said, I did not locate these exact contours, but from elevations and soundings obtained upon the ground I have interpolated these contours.

Q. Would the contour of the ground there have anything to do as to where high tide lines would be thrown?

A. The contour, sir, is the line that the tide makes.

Q. Yes. You have no means of knowing where the low tide was by any indications on the ground, but it is by this calculation you arrived at—

A. Simply by the calculation and by fixing with my two tides; but I have told you I connected up the reef in order to check my calculations on the day that they were taken.

(Testimony of H. P. N. Birkinbine.)

Q. Now, you couldn't get your instrument down here that day, where your low-tide line is?

A. O, no, sir.

Q. That was under water?

A. That was under water; that was water down there.

Q. The absolute, correct way would be if you could have gotten there would be to locate a point—this twenty-three and a fraction above on this upland above there, that would give you an exact or better computation of it if that could have been done.

A. Yes, sir.

Q. But you had to resort to that other method on this account?     A. I may explain to you.

Q. Now, how did you get it, how did you get the line on those curves and so forth the way it is now?

A. From different soundings that were taken around there; that would seem to bring them in a little here and they seem to [561] get pretty straight here across to the interpolation.

Q. You made soundings where?

A. I made some soundings around here, yes, sir, that are expressed on the map that were not expressed in figures; they are expressed in those contours.

Q. You didn't make any soundings over on this side? That is the reason the lines are a little more parallel?

A. No, sir; I think I sounded down to about here and interpolated.

Q. To get down to the west end, did you make any

(Testimony of H. P. N. Birkinbine.)

soundings on the west end in front of the west end, that is the east end? A. That is the east end.

Q. In front of the east end of survey 804—did you make any actual soundings there?

A. I made no soundings below the low-water line on February the 16th—that is, I made, of course—I didn't make soundings because I took elevations to as low as the low-water mark on the even date of February, the sixteenth; I don't know just now, as I, of course, can't carry these figures in my head—put that down somewheres.

Q. Well, I want to know whether you made any soundings at all to locate these lines?

A. Yes, sir.

Q. On the east end, you didn't make any soundings?

A. One minute, Judge. I can state accurately whether I have assumed the grade to continue in the same line from beyond approximate average sea level or from below approximate average low tide.

Q. You have assumed that?

A. Yes, sir, I have assumed that grade to continue—

Q. Just answer my question, what I want to know, whether you [562] made any soundings there?

A. No, sir, I did not.

Q. Did you make soundings over on the west end?

A. Yes, sir.

Q. How many soundings did you make there in order to locate these curved lines which you have indicated there, representing the different stages of the tide?

(Testimony of H. P. N. Birkinbine.)

A. Why, other than the elevations which I took on the beach at low tide, I should say about ten.

Q. You didn't put those soundings on this map, did you?

A. Only in expressing them on the contours.

Q. But the figures are not there?

A. No, sir, they are not.

Q. Who was with you when you did this work?

A. Mr. Alexander and Mr. Douglas.

Q. They assisted you?     A. Yes, sir.

Q. Who directed this work should be done and that these facts should be ascertained? Did Alexander leave it up to you or did he indicate to you what he wanted you to get, Mr. Birkinbine?

A. Mr. Alexander's instructions to me were, he explained to me the case and said he wanted me to do what I could to conscientiously back up their side.

Q. He explained the case and talked it over and you talked it over with Mr. Cheney too?

A. Mr. Cheney explained to me what the case was and told me something of the case. I can't state just to what extent now.

Q. And you went out and made the soundings on the west side that you have referred to? [563]

A. Yes, sir, the west side of the trap.

Q. And made no soundings on the east side of the trap at all?     A. No, sir.

Q. And the only soundings that you put on this exhibit are the soundings that is indicated between the pot or filler (spiller) and the reef?

A. And along the lead of the trap, sir.

(Testimony of H. P. N. Birkinbine.)

Q. Yes, along the lead of the trap. Mr. Alexander was out there when you was getting this data, was he?

A. Yes, sir, he was assisting me in any way he could.

Q. And Mr. Cheney explained to you that he wanted you to figure out the high and low tide lines and also to get these distances you have indicated here?

A. No, sir; Mr. Cheney he didn't; he left it entirely to me.

Q. He left it entirely to you?      A. To me.

Q. To you and Alexander?

A. He said to me, sir.

Q. O, to you. Well, Alexander, you did follow Alexander's advice some, didn't you?

A. No, I think Mr. Alexander didn't—not that I remember—

Q. He didn't make any suggestions as to where you should make the soundings at all?      A. No, sir.

Q. Didn't make any suggestions as to whether you should make the soundings on the east or the west side of the trap?

A. Why, no, Mr. Cheney had explained the matter to me. I supposed that the only argument would be at all was there the room on the west side of the trap and they wanted me to ascertain that.

Q. Yes, I see. And then that is what you went out to ascertain, [564] Mr. Birkinbine, was to figure out and make your measurements, and so forth, along upon the—on the east of the trap, on the right-



(Testimony of H. P. N. Birkinbine.)

hand side of the trap as you come into the bay?

A. On the west of the trap.

Q. O, it is the west, yes, I got turned around, on the west side?      A. Yes, sir.

Q. If you were going right into it from Chatham Straits, that would be on the left-hand side?

A. Yes, sir.

Q. Left-hand side. So it was by reason of these talks that you had with Mr. Cheney and Mr. Alexander that you didn't pay any more attention to the east side than you have testified?

A. Well, Judge, of course, I supposed there was nothing to be done there, and I would hardly do more work or incur any more expense to the man I was working for than was necessary.

Q. Yes. Then, you understood from their talks and conversations with you that the dispute was centered pretty much on the proposition of going into that upland on the west side of the trap?

A. Well, I can't exactly say as to that except what I was hired was only for the west side, sir.

Q. Well, that is what I meant.

A. I can't say as to what their opinions or disputes—you know.

Q. No, I understand that. That question was probably a little leading. But anyway you knew when you was to go out there you was to go out there to get this information which you have and you done it to the best of your ability?      A. I did, sir.

Q. Now, Mr. Birkinbine, Mr. Cheney asked you some questions [565] about whether or not a

(Testimony of H. P. N. Birkinbine.)

wharf could be built out from this claim from the east side, that is, from part of the claim that would remain to the eastward of the prolongation of the line of the lead of the trap, and you gave some testimony on that. Now, you don't know, Mr. Birkinbine, whether piling could be driven out there in that part of the water below the line of ordinary low tide or not, do you?

A. I know nothing of the possible penetration or the probable penetration of any of the ground on either side of the trap below the tides which I have seen there.

Q. The tides as they were when you was out there?

A. Yes, sir.

Q. Well, now, let me see, what stage of the tide—what stage or stages of the tide were you there?

A. The tide was running to about average low tide, if I remember correctly, about five feet above extreme low tide.

Q. Any way, you was there the days you were mentioning or—well, the tide-book would show the kinds of tides there was that day? A. Yes; sure.

Q. And below these particular lines of course you didn't see anything of the shore and you wouldn't testify anything of it under water? A. No, no.

Q. You wouldn't want to put your simple judgment from the shore there as it was against anyone's judgment who had gone there with a steamer for the purpose of making an anchorage and taking soundings of that shore, would you, Mr. Birkinbine?

A. I would not—I don't—I would not render any

(Testimony of H. P. N. Birkinbine.)

opinion, sir, for with regard to any possible driving you might get below [566] ordinary low tide; I gave my opinion on my direct as to what I thought was a feasible place for a wharf above where I have seen the tide.

Q. Yes. You don't want the Court to understand that you was giving that opinion at all out into the water above the points that the tide was at the days you were there? A. Below the point.

Q. Yes, below it; I mean out in the water.

A. Yes, sir.

Q. There was no request made by Mr. Alexander or Mr. Cheney that on the east end of this piece of ground that you make any soundings out in front of that piece of ground, was there? A. No.

Q. Now, Mr. Birkinbine, you talked about some methods of locating this reef. I will just get you to explain a little in detail how you located the reef as it is indicated on this plat.

A. The reef was located by a direction from this point opposite "a," which is the little capital—little "a" furthest west on the map, the "a" on the peninsula, to the point which is the highest part and by a distance from a pile in the—which is the southwest corner of the spiller of the trap to this point, sir.

Q. Well, now, you say that you located these points by triangulation?

A. I didn't locate this reef by triangulation because I couldn't see it from here.

Q. You couldn't see it from where—you mean the upland on the survey?

(Testimony of H. P. N. Birkinbine.)

A. From meander corner No. 1, which was one end of my base line. [567]

Q. So you located it simply by the real position that it is in with regard to the pot or filler (spiller) of the trap, did you—just let me get that?

A. With the position that it is in from the dot which is by the “a” on the end of the peninsula, that is, with a direction from there and the direction over there, sir.

Q. I see. Well, now, how did you get that dot that you took there as an initial point, how did you locate that?

A. That is one of my triangulation points. From setting—by triangulating from meander corner No. 1 and from the intermediate meander corner.

Q. You used that as a base line? A. Yes, sir.

Q. For your triangulation? A. Yes, sir.

Q. And located that point. What is the length of your base line that you used for this calculation, Mr. Birkinbine? A. 405.8 feet.

Q. And what distance is this point, that is, approximately, I mean, probable distance from that base line?

A. I can scale it for you but I can't tell you.

Q. Have you a scale?

A. Why, I won't swear that this is accurate; the scale is a little—might be off—may be off a foot or two—the point by “a.”

Q. Yes. Your initial point you established by this triangulation?

A. That is seven hundred and forty-five feet.

(Testimony of H. P. N. Birkinbine.)

Q. Now, how did you locate the trap?

A. By triangulation from the same base line, take the piles which are marked by solid black dots.

Q. How many of those? [568] A. Nineteen.

Q. Nineteen piles. You used this same base line and then located these piles out on the ground as they are driven?

A. Yes, sir; I used the same base line and located all the piles in the trap that I used in locating the peninsula and the point from which I located the reef.

Q. Now, what does your triangulation consist of—continued this as a base line? A. Yes, sir.

Q. You would put your instrument over at corner No. 1? A. Yes, sir.

Q. And what sort of an observation did you make in that course—take any one part of the piles?

A. And the way I took an angle of course had to give the numbers you know—take No. 1 which is the most northerly pile in the lead of the trap.

Q. Yes.

A. I obtain the azimuth of that line, sir.

Q. What do you mean by the “azimuth”?

A. The angle—the number of degrees that that line is east or south.

Q. Well, now, you got that line?

A. We have got that line. Then, of course, after setting up on these points my assistants went around to each point.

Q. To each one of these points, and you made the same observation?



(Testimony of H. P. N. Birkinbine.)

A. The observation at each point.

Q. Observation at each point, Mr. Birkinbine?

A. And then extended up on the intermediate meander point and I obtained the number of degrees west or south of that point number 1 was?

Q. Yes. [569]

A. And then No. 2 and so on around the trap, but of course they were not all west or south, some of them became east or south before we got through.

Q. Well, then, you had the dimension of base line and what angles did you have to make that computation?

A. The angles I read from my instrument, sir.

Q. And then you computed the distance of those—from the two points of your base line that you used as stations?

A. No, sir, I did not compute the distance.

Q. Well, what did you do?

A. I had a large protractor which I protracted this angle. I then protracted this angle and where the intersection of these two angles came was the situation of any pile.

Q. Well, did you get the distance of the pile from this base line? A. I took the rocky point.

Q. Rocky point? A. Yes, sir.

Q. You didn't compute the distance at all?

A. O, no, sir, the distance is in there; that would be much longer than my tape.

Q. Well, after you made your triangulation you could compute the distance?

A. I could have computed the distance if I thought

(Testimony of H. P. N. Birkinbine.)

it would be necessary.

Q. But you didn't do it?      A. No, sir.

Q. That is the proper way in making an official survey to compute the distance?

A. Why, it would to compute the distance from corner No. 1 to the location monument, but the location of the corner of a building I don't think it would. I don't think you would [570] where you have direct bearings, but where you have ten or twelve bearings you would have a great loss in error, accumulated error, that would be something different.

Q. You have given now all you did in regard to locating these piles?      A. Yes, sir.

Q. In fact, explained it fully. How did you locate the heart—there are one or two of those piles in the heart of the pot marked black; did you use these as objective points on the beach?

A. All the pilings marked with solid black points I located by that same system there.

Q. And it was according to that system you located the trap?      A. Yes, sir.

Q. And it was according to that same system you located your point "a" over here near the reef?

A. Yes, sir.

Q. And then, did you measure the exact distance from point "a" down to the reef?

A. No, I didn't measure that.

Q. Did you measure the actual distance from the pot of the trap you indicated here down to the reef?

A. Yes, sir, I did.

Q. With a steel tape?      A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

Q. How long is your tape?

A. Four hundred feet. I had to use two steel tapes in getting the measurement.

Q. Did you splice the tape?

A. No, sir; I held the two tapes at the intersection, the two tapes at the juncture, as you see—so. [571]

Q. You held them together? A. Yes, sir.

Q. And had a man on each end?

A. Had a man on each end.

Q. That is the way you got that distance?

A. I had the readable distance of both tapes myself, both zero ends of the tape were at the objects. I was in the boat and held the readable ends.

Q. Now, you have examined Hill's map here—there isn't very much difference in your map and his? A. Not a great deal, no, sir.

Q. You calculated at the extreme low tides and I thought you said the mean low tides, but I find you have them on your map the extreme low tides?

A. Yes, sir.

Q. You say that the extreme low tides according to your figures, that this last pile that is in the lead nearest to the shore will not be on tide land?

A. I say that providing there isn't a wharf in there will never be on tide land, sir.

Q. Well, I mean, not taking what may be, but I am taking as you find it out there at this time?

A. Yes, sir.

Q. According to your calculation at the extreme low tides it would still be in water?

A. It will still be in water.

(Testimony of H. P. N. Birkinbine.)

Q. And you didn't see the mean low tides yourself?

A. No.

Q. I thought you said mean low tide?

A. I may have made an error but I didn't mean to.

Q. I don't know; I guess I misunderstood you. Then, as I understand you testified at no stage of the tide that pile [572] would not be on tide ground?

A. No, sir, I don't think it would. I say positively it wouldn't.

Q. And you say positively from the calculations you have made? A. Yes, sir.

Q. That is the only positive knowledge you have about it?

A. Except that I took the soundings myself.

Q. That is what I say, from the calculations you made; you was never there in a June tide?

A. O, no.

Q. Now, I will ask you, Mr. Birkinbine, about the east end of this survey, looking down Chatham Straits, does the shore, take it from this survey, and does the shore line—how does it run—you haven't any indication here, can you take a lead pencil and approximately show how the shore line runs a little distance from the—from the easterly end of this claim, Mr. Birkinbine?

A. I am afraid, Judge, that I wouldn't be competent to do it.

Q. You didn't notice that particularly?

A. I may have noticed it at the time but just now

(Testimony of H. P. N. Birkinbine.)

I would not like to do it because I really don't feel sure.

Q. You didn't think it was of much consequence and didn't put it in the map, Mr. Birkinbine?

A. No, if I had thought it was of any consequence—

Mr. CHENEY.—Show on Mr. Hill's map.

Mr. WINN.—Let me examine the witness.

Mr. CHENEY.—Object to it as immaterial.

COURT.—Just a moment. The question has been gone into, Mr. Cheney. If this witness knows anything about it he may answer; if he don't let him say so.

Mr. WINN.—Yes, sir, I would like to have the privilege, if the Court please, of examining my witnesses without Mr. [573] Cheney breaking in; I don't think it is right.

Q. You didn't think it was of any consequence and didn't put it in?

A. Well, Judge, I made no observations and that is the reason I didn't put it in; nothing that I can figure it from at all.

Q. I see; so you wouldn't like to take and put it on the map here because it would be mere guesswork?

A. No, I wouldn't Judge.

Q. Now, on the other end, though, you did get data sufficient to mark what you have on this map, and brought the extreme tide, and so forth, as the shore line would, according to your calculation and judgment, be? A. Yes, sir.

Q. At the different stages of the tide. O, yes—now, Mr. Birkinbine, you haven't anything repre-



(Testimony of H. P. N. Birkinbine.)

sented on this plat of yours that will compare to what is called the peninsula that is on Plaintiff's Exhibit "D" and as indicated, and the words you have, the high tide and bare rock—you haven't anything of that kind on your map?

A. I will state, Judge, that I didn't. I didn't even make any sketch or consider it proper to take up any time to even look at this side of the peninsula. I didn't see it would make any difference, and as I didn't even walk over to that side I wouldn't—I didn't even put it in dots here.

Q. I see. Now, you didn't put it in there; you wouldn't be able now from what data you have to indicate on your map and plat what would probably be the contour of the line of this object I have just mentioned?

A. I have no data in any way that would enable me to sketch it, that is on the west side of the peninsula.

Q. Your principal object, then, as I understand, Mr. Birkinbine, [574] was to get the trap located and locate the reef that you have located on your plat and which has been offered in evidence in this case and to get these tide lands and other data that you have mentioned?

A. To get the east side of the peninsula and the shore of the claim, sir.

Q. O, let's see some of those pictures just a minute; then, that is all I will have, your Honor. Your Honor will pardon me for being a little slow this morning; been a little under the weather.

Q. These photographs that you have offered in

(Testimony of H. P. N. Birkinbine.)

evidence, Mr. Birkinbine, were taken by what is called a revolving camera?

A. Yes, sir—no, I beg your pardon, the whole camera doesn't revolve; simply the lense in the camera, it revolves.

Q. You have seen those revolving cameras?

A. The revolving camera is a little too much for me. I am afraid I wouldn't know how to work it.

Q. That is the reason your log looks something like a barrel hoop?

A. That is the reason makes them look round that way, and the reason you have to hold the picture on a slight curve to take that look out, otherwise you hold it straight this line here and the other one have the appearance of a round bay.

Q. I see; even your shore line would be on a curve the same as your log?     A. Yes, sir.

Q. Now, this photograph—what is it?

A. Exhibit 6.

Q. Now, where were you, Mr. Birkinbine, when this picture was taken—what was it taken on—indicate it on this plat of [575] yours there with reference to survey 804.

A. The camera was out at the cross marked "Pictures 3 and 4." This picture is No. 3. No. 4 was identical, just taken to be sure to get a good one. And the camera was pointing—the center of the camera would point about towards the, at the south, the extreme southwest corner pile of the trap, about towards this pile here, sir; that is about the center, I think.

(Testimony of H. P. N. Birkinbine.)

Q. What is that—that reef that makes out?

A. That is the peninsula, sir.

Q. That is the peninsula?

A. That is the peninsula. This is the place where Mr. Hill has marked “bare rock covered at high tide.”

Q. O, I see. This is what?

A. There is a little place here which is never covered. You see a little vegetation growing there; I didn't sketch it because a very little thing and I didn't—I would have to carry levels way out there, couldn't depend on taking a shore line because the waves make great big runs up there.

Q. You don't remember about what was the stage of the tide when this Defendant's Exhibit 6 was taken?

A. The stage of the tide—let me see, Judge; the tide was about half in; it was coming in from low tide.

Q. About half in?      A. Yes, sir.

Q. The reef you have marked on that map and plat don't show up in this photograph, does it?

A. No, I think, Judge, that—I don't think would be visible from here. I say positively it wouldn't be visible or else I would locate it from this corner. This is at 1 or very close to corner No. 1. [576]

Q. Let's see; why wouldn't that be visible?

A. Well, because the reef—nothing that stands behind this point—just a small snap.

Q. Have you any of these photographs to show that reef?

(Testimony of H. P. N. Birkinbine.)

A. No, I have no photographs to show that reef.

Q. Did the reef show up at any time while you was there?     A. Show up?

Q. Above the water?

A. A little bit, not very much.

Q. None of the photographs show that?

A. O, no, none of them, I know it for sure, Judge.

Q. Now, let me see one of these or two of the other long ones; here is the one that is marked—well, you see the mark on it.

A. That is marked “No. 5.” That picture I can’t tell very much from, is very poor. I was standing on this pile here.

Q. You were standing on the trap, by the trap?

A. No, I was standing on the northwest corner or westerly of the spiller here.

Q. The rectangular part of the trap?

A. Yes, sir, where the word “picture” and “5”—that is here, that picture was taken over here.

Q. Were you looking in the direction of the lead pile—the lead of the trap?

A. I was looking northeasterly about a little east of the cabin.

Q. The cabin don’t show up?

A. No, sir, that picture was very poor, of course, from the motion, took from the trap, and I had to take a very quick exposure.

Q. This would be showing the ground then, Mr. Birkinbine, on what end of this survey No. 804?  
[577]

A. That would show the ground on the—more

(Testimony of H. P. N. Birkinbine.)  
particularly on the west end.

Q. On the west end?

A. But would show it a little bit, the piles on the east end, but the fact is it don't show anything now.

Q. What is this other one—possibly a little bit better?

A. That is No. 7—pictures No. 7 and 8 which are identical and taken from approximately where the cross and approximate location of picture 7 and 8; the direction of that picture is north by a little east, you see, north by—about the center of the picture about points towards the eastern end of this rocky bluff.

Q. What part—what part of survey 804 would be shown on this picture, Mr. Birkinbine—that is to the best of your ability to state?

A. The trap hides the east side of it, that is the part of the claim which is to the east of this rocky bluff, and the only part which shows is the rocky bluff and the western side of the claim.

Q. Is that where that little beach is—does it show the beach there?

A. Yes, sir, shows the beach on the western side.

Q. Yes?

A. The beach runs from that—it is very dim, Judge.

Q. It is indicated by that light line?

A. That light line.

Q. In the foreground of the picture?

A. Yes, sir, and the rocky bluff is over there to there.



(Testimony of H. P. N. Birkinbine.)

Q. And you can see all of the west end of this claim in this photograph?

A. No, sir, the trap—the trap hides the westerly—the trap causes it— [578]

Q. You didn't testify to that one. I didn't ask you about that one?

A. No, sir, this one was taken—

Q. Now, you are talking about what exhibit now?

A. This is Exhibit 8.

Q. Where was that taken from?

A. It was taken from approximately from the cross marked "Approximate location picture 6" and is looking on the northerly, on a north—

Q. Place your finger on this exhibit of yours, on your map, and show about where you were when this picture was taken. A. Right here, sir.

Q. And does—does the west—no, the east end of the survey show up in that picture?

A. Yes, very slightly, right in here, sir.

Q. About—can you indicate on this photograph, Mr. Birkinbine, as to where corner No. 2—that is 2?

A. Yes, sir.

Q. —of this survey would be, if you could, if not—

A. No, Judge, I can't, it is not distinct enough.

Q. You can't? A. I am sorry I can't.

Q. That is all right. That is all, your Honor.

COURT.—Any redirect examination?

#### Redirect Examination.

Q. (By Mr. CHENEY.) Just a question or two, Mr. Birkinbine. You have been questioned to some

(Testimony of H. P. N. Birkinbine.)

extent about what you were asked to do and asked to show on your map by myself. Now, you were serving here on the jury, weren't you?

A. Yes. [579]

Q. And I asked you first, I believe, about this survey, didn't I, about making the survey, I spoke to you about it?

A. Yes, I think both you and Mr. Alexander were together in Burford's; I think you were playing pool and Mr. Alexander came in and wanted to know whether or not I could find any fellow from Haines—

Q. Well, that was when you first knew about it, but you was here in the courthouse; isn't it a fact that when I called you over and took you into Mr. Robertson's office and asked for the exhibit which was their survey or map that had been in evidence at the last trial? A. Yes, sir.

Q. And didn't I tell you we had no survey or map of Alexander's and that I asked you to look over that map that Mr. Robertson showed you and that you examined that map and afterwards went out with Mr. Alexander and made the survey, and that I told you that Mr. Alexander had said when the trial was on last year he thought it was—that the map that Mr. Robertson showed you wasn't exactly correct with reference to the location of the piles, the peninsula and the bare rock and the trap and the distance between them?

Mr. WINN.—I object to the conversation as being hearsay.

Mr. CHENEY.—You drew it out.

(Testimony of H. P. N. Birkinbine.)

COURT.—I don't think it is material at all.

Mr. CHENEY.—Why does he ask all these things trying to make a record here?

COURT.—The witness has said he has done that and he has told just what he did.

Mr. CHENEY.—But, your Honor, counsel has questioned him so much if he made soundings on the west side of the trap and not on the east side and it calls for an explanation. [580]

Mr. WINN.—I will withdraw the objection to save any time, I will withdraw the objection to save any time.

COURT.—You can answer the question, Mr. Birkinbine.

A. Mr. Cheney told me that he thought the trap was closer to the peninsula on the map than it was in reality and that was one thing he wanted to ascertain, whether the trap was closer to the peninsula.

Mr. JENNINGS.—On the map.

Q. (By Mr. CHENEY.) You made that survey in your own way, didn't you? A. Yes.

Q. Mr. Alexander didn't tell you how to make it?

A. O, no.

Q. And he didn't tell you how to make it?

A. No.

Q. But you saw on the map that Mr. Hill had made and was introduced at the last trial, the map that Mr. Robertson showed you, showed the soundings and the marks there on that map, and I will ask you if that was the reason you thought it was important to get the depth of the water and the distance

(Testimony of H. P. N. Birkinbine.)

between the trap and the point there?

Mr. WINN.—Now, I object to this question, not proper redirect examination and argumentative and leading and suggestive.

COURT.—He may answer. I don't think it is very material.

A. Well, as I said in my cross-examination that I thought the whole argument when I went out there, I thought that the argument was going to hinge on the mouth of this space between the peninsula and the trap, therefore that is the reason I made the little cross-section on the map. [581]

Q. (By Mr. CHENEY.) And you thought it was important to get the exact distance from the trap as it stands at this time and the peninsula and the bare rock, didn't you, that was the reason you measured it with tape?

A. Yes, that was the reason I got it as I stated, and measured it with a tape.

Q. You were not told not to make any soundings on the east side of the trap by either myself or Mr. Alexander?

A. No, Mr. Alexander asked me the second day, "Have you got all you want?" and I said, "Yes." He didn't ask me if I wanted anything more or anything about it.

Q. Now, you were asked something about—you stated that you had never constructed a wharf, that is, had the sole construction of a wharf in salt water. I will ask you if you ever had any experience in the actual building of a wharf, that is in the management

(Testimony of H. P. N. Birkinbine.)

and supervision of it, into salt water, and, if so, for what distance and at what place?

Mr. WINN.—I object to it as immaterial, incompetent and irrelevant.

Mr. CHENEY.—The witness started—

Mr. WINN.—Just to save the record.

Mr. CHENEY.—It is redirect.

Mr. WINN.—I don't think it throws any light on this case, if the Court please, I am not doubting Mr. Birkinbine's mechanical ability to build a wharf; it is only this, he says he don't know anything about the bottom of it at certain places, and so forth.

COURT.—I think it has been covered in direct already, but you may answer. It seems there are a great many questions on it.

Mr. CHENEY.—We could get through quicker if Judge Winn didn't object and then withdraw his objection and take up [582] the time.

A. I stated, Mr. Cheney, on cross-examination I never had to do with a wharf for the entire construction of the location surveys for the location of anyone particular wharf; I have, however, been on the entire construction of a wharf into salt water.

Q. For what distance?

A. That is not including any location surveys for locating that wharf.

Q. I understand, but what was the work you did, that is what I am getting at?

A. Why, I think the approach, considering the approach to the wharf, the whole thing was about twelve hundred feet long.



(Testimony of H. P. N. Birkinbine.)

Q. And I understand you to say that you had experience in the construction of wharves and trestles some place down in the east or where, down in salt water, there—before you came to Alaska?

A. Yes, I have. Well, I have made location surveys for—for a wharf at Hampton Roads, went out as far as thirty-eight hundred feet. We also made some soundings, that was for the penetration we had to get; then, I was made—I have been inspector of pile-drivers one time and another.

Q. Inspector of what? A. Pile-driving.

Q. Pile-driving? A. Yes, sir.

Q. For the Government?

A. Yes, for the Government.

Q. You have been railroad surveying up here in Alaska for Rosene and different people in Alaska?

A. Well, the question, while I have done a little survey work for Rosene, but most of my work for Rosene has been reconnaissance work, just observations. [583]

Q. Preliminary?

A. And practically no instruments besides the man running the barometer for obtaining your height, that is, no instruments besides the barometer and field-glasses and camera and one thing and another, just for reporting purposes.

Q. Well, now, Mr. Birkinbine, if you will just briefly give the explanation, if you have any that is, as to what your opinion is—I withdraw that—can you give the Court any reason of your own why you think Mr. Hill's survey may be different from yours,

(Testimony of H. P. N. Birkinbine.)

—with the location of this reef, that is, his map locates this reef over here nearer the trap and yours nearer this way, besides what you have already given; if you have any explanation of that kind, Mr. Birkinbine, you will have an opportunity to give it. You were asked about it by Judge Winn.

A. Well, of course, I don't know how Mr. Hill may have gotten the reef over there. I don't know what directions or whether his trap was located on the same base line that his reef was, and if it isn't why the connections between the two base lines might not have been—might not have been correct or something like that—is a very hard thing to state where a man might have made an error or how he obtained results that he did.

Q. Well, is there anything that would account for a few feet difference in the two maps? In relation to the intermediate point there?

A. Well, if Mr.—if Mr. Hill used that portion of the meander line east of the intermediate point we will say for the location of the trap and the portion of the meander line west of the point as the base line for the location of the peninsula, he might have gotten an error in there [584] as those two meander lines—the angle between those two meander lines is not as called for by the Surveyor-general.

Q. That is what you mentioned yesterday—did you mention that? A. No, I didn't mention that.

Q. Now, what was that last part of your answer,—what isn't called for by the Surveyor-general? Just explain to the Court.

(Testimony of H. P. N. Birkinbine.)

A. I suppose when the official survey was made there was a little error in closing, and in order to bring that error out they made a little different angle at this intermediate point than is in reality because they generally throw the closing, I believe, in such cases as that on the meander point because the meander line is something which is indifferent, you see. This is not a corner here—and I found the angle at that meander point one degree from what—exactly one degree from what the Surveyor-general reports it. That might have made a difference. I also checked this by measuring from the corner to the bearing of the trap and found that that would situate the corner where my instrument had situated it from the intermediate meander point.

Mr. CHENEY.—That is all.

Mr. JENNINGS.—Just one question, Mr. Birkinbine.

Q. Now, irrespective of your survey and Mr. Hill's survey— A. Yes, sir.

Q. —is that bare rock, that reef between—no, irrespective of any survey at all, is that what has been the reef, this here is a reef—is that part of what has been also reef, to the east of the bare rock and trap?

A. No, sir.

Q. It is not. Now, that is from observation?  
[585]

A. Well, some observation.

Q. I don't mean technical observations, but looking at it you say it is not part of the two?

(Testimony of H. P. N. Birkinbine.)

A. I have run right along there a steel tape from the trap.

Recross-examination.

Q. (By Mr. WINN.) Now, how much of this reef you call it, that is bare rock, represented this in the Defendant's Exhibit "D," was visible while you were out there?

A. About forty feet of it, Judge; forty feet in length, that is about, I don't remember just what my figures were.

Q. And did you, upon the data that you have, would you be unable to place this bare rock or reef and peninsula on this map or plat of yours, Mr. Birkinbine?

A. Sir?

Q. I say, from the information that you have and the data, would you now be unable to place on this exhibit this peninsula called bare rock, and so forth?

A. I beg your pardon.

Q. What else?

A. I beg your pardon; I answered that bare rock; I made an error; I thought you meant this reef, this island. I beg your pardon but made an error.

Mr. CHENEY.—It is Judge Winn's error. He asked for bare rock.

A. Will you please ask the first question again?

Q. (By Mr. WINN.) You told Mr. Cheney that outside of all the surveys and everything else that something was not between the trap and the bare rock?

A. This reef, sir, isn't between the trap and the bare rock.

(Testimony of H. P. N. Birkinbine.)

Q. Well, it isn't between the trap and the bare rock on Mr. [586] Hill's map.

A. No, Mr. Hill shows it a little closer to the trap.

Q. Well, let's see.

A. If we were going to get technical we might, I don't know, call a portion of it between—yes, it is.

Q. Well, the bare rock, probably some of it would show up there.

A. Is that the extreme reading, the bare rock—that isn't the bare rock.

Q. Where is the bare rock?

Mr. CHENEY.—Talking about the reef.

A. With respect to the surveys—

Q. But you don't know what stage of the tide except in feet in this case Mr. Hill made that bare rock and reef.

A. What stage of the tide Mr. Hill made of the survey?

Q. Yes.

A. No, I don't know it, Judge. You asked me another question about how much of this bare rock was exposed and I made an error and I answered you for the reef. If you would like to ask me over again I would like to correct myself.

Q. All right, I am going to ask you that. Now, on your plat—now on your plat that is called Defendant's Exhibit 4, on your plat— A. Yes, sir.

Q. —Defendant's Exhibit 4, you have the reef somewhat smaller than the one that is represented as reef on Hill's map, have you?

A. Yes, sir; that is the point.



(Testimony of H. P. N. Birkinbine.)

Q. Were you there at low tide on either one of these days you were there?

A. I don't know as I was out just at the time the tide was low. I don't remember just the time of the day I was out [587] there, sir.

Q. During—did you intend to show all of that reef on your exhibit 4—the reef now, I mean, that is the little round spot? A. Yes, sir, I intended to.

Q. Well, how does it drop off from that?

A. It drops off gradually at first and then gets steeper, sir.

Q. Well, you didn't—you aren't stating to the Court but at what state of the tide there would be more of that reef showing than is indicated by your map and plat?

A. That is what I intended to state so.

Q. That there wouldn't be any?

A. At extreme low tide?

Q. Wouldn't be any more at extreme low tide?

A. Yes, sir.

Q. Does the ground ever get—ever get bare between that reef and the peninsula that makes out there called bare rock—do you know whether it ever gets dry between those two there?

A. I don't think it is; I can't swear; I was out at the lowest part of that little saddle; but I don't think it does.

Q. You mean that all the ground that lies between the trap and what you have put on there as a reef is navigable water at all stages of the tide?

A. Well, Judge, there is a great deal of differ-

(Testimony of H. P. N. Birkinbine.)

ence—navigability has a very broad meaning; I would hate to say anything about it.

Q. Well, but what would you say at the lowest stage of the tide in reference to the depth of the water right along about where you have indicated that reef?

A. Well, as I say, I haven't really got—I can't swear to having [588] sounded in this owing to the fact of the distance between these two. I located the little island from the end of the peninsula and I let it go at that because I didn't think I would be asked to state that it was at all navigable. I didn't suppose it was.

Q. Now, let's see. You take Hill's map and your map, just for the sake of the record. That will be the last question I will ask you, Mr. Birkinbine. And state—

A. Yes, sir.

Q. —and state from the nearest point of this reef to the nearest point of this trap or any portion of the trap, to get the distance, and then state what Hill took the distance. Let's see what the difference is.

A. The nearest point, referring to the nearest point of the trap, sir?

Q. Yes, sir. Any portion of the trap.

A. That is the extreme eastern side of the reef or the little island?

Q. That will be all right. The nearest point shows—

A. All right.

Q. I just want to show—

A. To the southwest corner of the spiller, I make that, sir, three hundred and fifty-two feet. I would sooner call it—fifty feet, to be sure.

(Testimony of H. P. N. Birkinbine.)

A. Well, three hundred and fifty feet. What does Mr. Hill make it? A. Same scale, Mr. Hill.

Q. Same scale; yes.

A. Call it two hundred odd or sixty feet—sixty-two, maybe.

Mr. WINN.—That is all. [589]

Mr. CHENEY.—That is all.

COURT.—Just one question, Mr. Birkinbine.

Q. I must have misunderstood you yesterday. I understood you to say by tape-line you measured from the west side, with a tape-line to the trap would be four hundred and twenty-one feet?

A. To the dot on the reef; that is the point the reef was located on.

COURT.—Very well.

Mr. CHENEY.—I will call Mr. Douglas. [590]

**[Testimony of W. T. Douglas, for Defendant.]**

W. T. DOUGLAS, being duly called and sworn, testified as follows on behalf of the defendant.

Q. (By Mr. CHENEY.) Give your name, state your name and residence.

A. W. T. Douglas; Juneau, Alaska.

Q. What is your occupation, Mr. Douglas?

A. Well, mostly pile-driving.

Q. Mostly pile-driving? You testified at the hearing on this case last March here, didn't you?

A. Yes, sir.

Q. And you helped drive the fish-trap that Mr. Alexander now has out there in the cove that has been testified— A. Yes, sir.

Q. —about. You are familiar with that trap loca-

(Testimony of W. T. Douglas.)

tion?     A. Yes, sir.

Q. And with the shore along in front of this survey, are you?     A. Yes, sir.

Q. I will ask you if you were present on February 16th and 17th of this year when Mr. Birkinbine made a survey of this homestead and the trap—were you present on that day?     A. Yes, sir, I was.

Q. And did you assist in making the soundings that were made and appear here and have been testified to by Mr. Birkinbine?

A. Yes, sir, I was in the boat.

Q. You were in the boat and assisted him?

A. Yes, sir.

Q. What were those soundings made with, a rope or tape?     A. Tape, a steel tape.

Q. A steel tape. And were you present when these pictures that are introduced in evidence were taken?

A. Yes, sir. [591]

Q. When these pictures were taken?

A. Yes, sir; I was.

Q. I just hand you exhibit No. 11, which is a picture, No. 3,—are you one of the men whose picture shows in that photograph?

A. Yes, sir, I am.

Q. What were you standing on?

A. Standing on the bedrock.

Q. Were you present when picture No. 1 was taken—that was the picture taken at this point marked with a cross over on the east side of survey 804?     A. Yes, sir.

Q. You were right there at the time the picture was

(Testimony of W. T. Douglas.)

taken, were you?      A. Yes, sir.

Q. What is the—is there a high bluff over here on this end of the survey or is it just as is represented in that picture?

A. It is just as represented in that picture.

Q. This end over on the east and here was quite a distance from where the end line is located?

A. Yes, sir.

Mr. WINN.—Object to the question as leading and suggestive.

COURT.—He has already answered.

Q. (By Mr. CHENEY.) I will ask you if you know—I don't know whether you do or not—I will ask you whether or not the water is deeper in front of the east end of this survey than it is in front of the west half of the survey?

A. Well, I don't know. I didn't make soundings there but I think would be, judging from the shore, the water is deeper on the east side than on the west side.

Q. Well, to come down to the map just for a question, Mr. Douglas; look at the figures that show the depth of water [592] where marked 4.9 at the lead pile, for instance. I will ask you that—first, does that represent the correct measurement that you assisted in taking that day of the depth of water?

A. Well, I couldn't swear whether it was a correct measurement, Mr. Birkinbine took the measurement.

Q. He read the tape?      A. He read the tape.

Q. Did you assist?

A. I was out in the boat, rowing the boat when the



(Testimony of W. T. Douglas.)

measurement was taken.

Q. You know—I will ask you nothing about the survey now—but don't you from your observation—you have been there a great many times?

A. Yes, sir.

Q. And for a considerable number of days and weeks at a time, haven't you?     A. No, sir.

Q. Well, you have been there how many times?

A. Well, I could not just exactly state how many times I have been there.

Q. Well, you was there last year in March for several days?     A. Yes, sir.

Q. And several days at a time?     A. Yes, sir.

Q. Assisted in the entire building of the trap?

A. Yes, sir.

Q. And were you there any time after that until this February?     A. Yes, sir, I was.

Q. When—during the summer?     A. Yes, sir.

Q. You have seen that trap then at all stages of the tide? [593]

A. No, sir, I haven't,—that is, not to remember.

Q. But I mean whether you remember it or not, but you have been there at all stages of the tide?

A. Yes, sir.

Q. During the past year?     A. Yes, sir.

Q. Then, I will ask you this question, if from your actual observation during the past year you know whether or not this lead of Alexander's trap is below extreme low tide, from your observation?

A. Well, any time I have been there that pile has never been dry.

(Testimony of W. T. Douglas.)

Q. And you have been there—well, were you there part of the summer?

A. No, sir, I didn't work there in the summer.

Q. Were you there during the summer?

A. Yes, sir, I was.

Q. And you were there during the month of March, some part of the month of March last year?

A. Well, practically all during the month of March we went there, that is off and on.

Mr. CHENEY.—You can sit down.

Mr. WINN.—Is that all?

Mr. CHENEY.—I think so, I think that is all from this witness.

Cross-examination.

Q. (By Mr. WINN.) You went there with the pile-driver when they first commenced to drive the trap, with Alexander, did you, Mr. Douglas?

A. Yes, sir. [594]

Q. Have you ever been in there before—had you ever been in there before?

A. Prior to this time?

Q. Yes, sir. A. Yes, sir, I had.

Q. Were you there when the Alaska Packer's Association trap was there?

A. Yes, sir, I was there once.

Q. Where is this trap of Alexander's with reference to where that trap was?

A. Well, that I could not state, Judge.

Q. You couldn't state that?

A. But as near as I can remember, it is pretty nearly the same place.

(Testimony of W. T. Douglas.)

Q. Did you find any of the Alaska Packers' Association Company's piles there when you got there?

A. No, sir.

Q. Did you see any piles at all?      A. Yes, sir.

Q. How many?      A. I think it was five.

Q. Anything stuck up on them?      A. Yes, sir.

Q. What was it?

A. Well, there was a notice "J. T. Barron," I think.

Mr. JENNINGS.—I don't think that is cross-examination.

Mr. CHENEY.—That is going into a different matter. If he wants to call him for his own witness then he can go into it; not proper cross-examination.

Mr. WINN.—I want to find out about the condition out there. You examined him. [595]

Mr. CHENEY.—Asked him in regard to the tide. I didn't ask him anything in regard to the Alaska Packers' trap.

COURT.—I hardly think it is cross-examination, Judge.

Mr. WINN.—Well, I guess he has answered.

Mr. JENNINGS.—He has already answered. I object to going into it any further. He has answered.

Q. (By Mr. WINN.) I understand you helped drive the entire trap of Alexander—he had no piles in when you got there?      A. No, sir, he did not.

Q. Well, now, in the driving of those piles for the trap did you examine at all just where to put them down and did you have to take some soundings or not before commencing to drive the trap?

(Testimony of W. T. Douglas.)

A. Well, I don't know whether he took any soundings at the time or not, but I think he started to drive it as near as he could as to where he originally had the old trap, the Alaska Packers' trap.

Q. Well, if he had made any soundings or not there you would have known of it, wouldn't you, Douglas?

A. Well, I think I would if I could remember it, but I don't remember.

Q. What was done—did you assist in driving the trap? A. Well, I was boom man on the driver.

Q. You were boom man on the driver—what does that man do?

A. Well, you get the piles alongside and get them ready to drive.

Q. And did he drive them right along or break off some and did he shift around and just find good driving right straight along?

A. Well, he found very good driving, some places they wouldn't drive as far as others. [596]

Q. You helped him to drive the trap and get it out to the condition it was in when you testified in this case on the motion to dissolve the preliminary injunction; you helped him over into that stage of the trap? A. I did.

Q. And he drove the lead of the trap there and all of the trap without any difficulty at all, that is, in the driving? A. Yes, sir, he did practically.

Q. Well, how was it—did you drive out on the lead of the trap at that time until you couldn't drive any further or did you quit before you reached that point? A. Well, if I remember right we quit.

(Testimony of W. T. Douglas.)

Q. And it wasn't because you couldn't drive any further?

A. No; I don't think that he tried to drive any further at that time, but if I remember right, it was hard driving.

Q. Hard driving?      A. Yes, sir.

Q. While you was there with him and driving this trap up to that point did you do any sounding around the beach?      A. No, sir.

Q. No sounding done at all?      A. No, sir.

Q. Do you know why you stopped right there at that point driving?

A. Well, if I remember right, it was late at night or blowing or something that we left off driving.

Q. Well, why didn't you go back the next day and drive?

A. Well, that I don't remember like, whether blowing the next day or not. I know we laid nineteen days in Funter Bay with the driver though.

Q. After you pulled out from this place? [597]

A. Yes, sir.

Q. Well, I know, but when did you pull out from this place with the pile-driver, did you pull out just as soon as you got the trap driven in the manner you have stated?      A. Yes, sir.

Q. You pulled out. Well, now, I asked you if you knew why you quit driving at that time there?

A. If I remember right, it started to blow and we had to quit.

Q. And that was the only reason you stopped?

A. Yes, sir.



(Testimony of W. T. Douglas.)

Q. Did you go back and help him—help him to fill out the lead to the place where it is now driven?

A. Yes, sir.

Q. Well, did you say it was a storm that caused you to stop there, Douglas?

A. I think it was, so far as I can remember, either a storm or else had to go in for the night; I don't just exactly remember whether it was a storm caused us to quit at that particular time or whether we went in for the night to Funter Bay.

Q. Well, had you been in the habit of running up to Funter Bay with your pile-driver every night?

A. Yes, sir.

Q. Every night with it?      A. Yes, sir.

Q. During the whole time you drove your trap?

A. Yes, sir.

Q. How many days or nights were you driving your trap?

A. Well, that I don't remember; I know I was with Alexander a month during the time this trap was constructed.

Q. Well, you didn't anchor or stay in that place ever, not a solitary night, not one night? [598]

A. No, sir, I don't think we did.

Q. Now, then, when you went back to commence driving the remaining portion of this lead did you have any trouble in driving?

A. No, sir, if I remember right we found fairly good driving, some places they drove hard one pile and the next pile would drive good.

Q. Did you find any remains of the lead of the old

(Testimony of W. T. Douglas.)

Alaska Packers' Association Company's trap there while you was driving the remaining part of that lead?     A. No, sir, did not.

Q. Alexander is the man that directed—had direction of the driving of the piles, did he, Douglas?

A. Yes, sir.

Q. And you simply obeyed orders in that respect?

A. Yes, sir.

Q. You didn't know anything yourself about the ground there, whether you could drive here and there anywhere, did you?     A. No, sir, I did not.

Q. You didn't make any soundings?

A. No, sir.

Q. You left all that to Alexander?     A. Yes, sir.

Q. And you just continued on driving that lead out in the line that it is now or was finally completed?

A. Yes, sir.

Q. Well, what made you stop where you did?

A. Well, I guess couldn't drive any further towards shore.

Q. Got to be hard driving there?     A. Yes, sir.

Q. Well, now, were you there while he was fishing the trap last summer?     [599]

A. I was there once while he fished it.

Q. Did he have his web extended out there beyond this last pile?

Mr. CHENEY.—You are going into something that is not proper cross-examination. I object to it.

COURT.—It isn't proper cross-examination.

Mr. WINN.—I am asking if he helped to drive the trap. I thought I could ask him anything about the

(Testimony of W. T. Douglas.)

driving of the trap, how much—that was passed over, your Honor, yes, sir.

Q. Now, you answered Mr. Cheney's question that that last pile in the lead was never on dry land while you were there. Did you take particular notice every time you were there to go out and see whether that pile was on dry land?

A. No, sir, I did not take particular notice to go out there and look.

Q. You didn't think it made any difference whether dry land or deep water, did you, Douglas?

A. No, sir, I did not.

Q. And you didn't pay any particular notice to that? A. No, sir, I didn't.

Q. Now, I will ask you, if the Court please, to get the record clear on it—I will ask you if you wasn't there and noticed during the summer that there was a cable attached to that last pile and run over on to the shore and that there was a web strung on that cable?

Mr. CHENEY.—I object to that.

Mr. JENNINGS.—Not cross-examination.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception, your Honor.

Q. You were there while the trap was fishing, as I understand?

A. Yes, sir, I was there once. [600]

Q. Once. What month was that in?

A. I think it was some time the latter part of August, I don't just exactly remember the date.

Q. What were you doing there, Douglas; you

(Testimony of W. T. Douglas.)

weren't working for Alexander?

A. No, sir, I was working for the Tee Harbor Packing Company.

Q. In the same bay? A. No, sir.

Q. O, well, you just happened to go in there while working for the Tee Harbor Packing Company—is that it? A. Yes, sir.

Q. Only there once during the summer while fishing the trap? A. Yes, sir, that is all.

Mr. WINN.—That is all, your Honor.

Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Douglas, what was the reason that you took the driver and went clear up to Funter Bay every night for nineteen days or during the night of nineteen days and during the time you were driving that trap.

A. Because I guess it wasn't a safe place to lay.

Mr. WINN.—I don't want any guessing about it. I move to strike his answer out.

Mr. CHENEY.—I have asked him what was the reason.

COURT.—A matter of guessing would not be of any information to the Court, if the witness knows of any reason—

Q. (By Mr. CHENEY.) What was the reason you went up to Funter Bay harbor for the night?

A. Well, I don't know; as near as I can tell,—of course, I wasn't handling the driver or handling the boats—but as near as I can tell, they run up there for harbor for the night; [601] didn't consider it safe to lay there with the driver.

(Testimony of W. T. Douglas.)

Mr. WINN.—I move to strike the answer out, your Honor; does not furnish any information; he said he wasn't in charge, and as near as he could tell they had to get out there to anchor there or some place else.

COURT.—I think it may stand. If you have doubt of his information you may inquire, if it becomes material; I don't think any part of it is material, and taking a lot of unnecessary time, gentlemen.

Q. Mr. Douglas, you don't know how many soundings Mr. Alexander made before he drove his trap—you were simply a pile-driver man that was taken out to drive these piles when he got ready to drive in last March? A. Yes, sir.

Mr. WINN.—Leading and suggestive, very leading.

Mr. JENNINGS.—What is he leading him to?

COURT.—O, proceed, gentlemen, proceed.

Q. (By Mr. CHENEY.) I say you don't know anything about how many soundings Alexander had made prior to the 8th of March when you went out there to drive the trap? A. No, sir, I don't.

Mr. CHENEY.—That is all.

Q. (By Mr. JENNINGS.) Mr. Douglas, just one question. Judge Winn dragged out of you that when you first went there there were five piles sticking up there. How far apart were these five piles?

A. Well, I don't know just exactly how many feet they were apart.

Q. Well, approximately?



(Testimony of W. T. Douglas.)

A. But I should say from between ten and sixteen feet apart.

Q. Were they up and down in Chatham Straits or laid in back?

A. Three of them in a row and two of them together like a [602] dolphin.

Q. Three in a row. How far from the shore now?

A. Well, I don't know just exactly how far from the shore but I can tell on the map or plat they have got there.

Q. Well, approximately, I don't want exactly just how far?

A. Probably three hundred and fifty feet, may be, from the shore.

Q. About three hundred and fifty feet from the shore—there were three piles—to where the nearest pile of the three in the row were, about the nearest to the shore? A. Yes, sir.

Q. Well, how far—how much farther out into deep water was the dolphin?

A. Well, they were a series, the piles was practically between ten and sixteen feet apart and the dolphin was the outside one.

Q. All right. That is all.

Mr. CHENEY.—That is all.

COURT.—Anything further, gentlemen?

Mr. WINN.—Nothing further.

COURT.—Call the next witness.

Mr. JENNINGS.—If the Court please, that makes the end of our case.

Mr. CHENEY.—I want to offer before we close, I

(Testimony of W. T. Douglas.)

want to introduce in evidence the same notice that was introduced on the last trial, given by Mr. Barker as agent for Mr. Barron there to Mr. Alexander. It is one of the exhibits. I think it is with Mr. Robertson.

Mr. WINN.—I would like to see it.

Mr. CHENEY.—Mr. Burton has seen it.

Mr. JENNINGS.—I would like to see it.

COURT.—The Court will be in recess until two o'clock this afternoon. [603]

2 o'clock, March 20, 1912.

Mr. WINN.—I want to call Mr. Birkinbine for a question or so whenever convenient to Mr. Cheney.

Mr. CHENEY.—Well, what for—cross-examination?

Mr. WINN.—Yes, one or two questions I want to ask him; I didn't even question him about it.

Mr. CHENEY.—All right.

[**Testimony of H. P. N. Birkinbine, for Defendant (Recalled).**]

H. P. N. BIRKINBINE, heretofore duly sworn, being recalled, testified further as a witness for the defendant.

Cross-examination.

Q. (By Mr. WINN.) Just one thing that I omitted to question you about, Mr. Birkinbine. You started to explain in answer to one of my questions about this method of calculating the distance by the use of your instrument and the stadium—you call it the stadium, isn't it? A. Stadia, yes.

(Testimony of H. P. N. Birkinbine.)

Q. Stadia? A. I didn't use any stadia.

Q. I want to ask you a question or so about that proposition. Now, let us see if I am right about this use of this stadium. You have a thing below here—

A. Rod, they call it, sir.

Q. Rod, you call it, yes—marked with what colors?

A. Red, black or white; the field is white.

Q. Yes. Then, you have a cross-piece, of course, on it something like you can slide up and down, do you not? A. Sometimes.

Q. Yes. Some of them have that?

A. Some of them have a round target. [604]

Q. Now, then, as I understand, maybe I am incorrect about it—suppose that I wanted to calculate the distance from here, say, down to B. M. Behrend's store? A. Yes, sir.

Q. Now, then, you would first send a man down to B. M. Behrends' store with that rod, wouldn't you?

A. Yes, sir.

Q. And you would remain back here with your instrument? A. Yes, sir.

Q. Now, just tell the Court what you would have that man down at the store do and what you would do in order to calculate the distance between here and B. M. Behrend's, by the use of your stadium without other instruments?

A. When I use the stadia for a distance as great as between here and B. M. Behrends' store I would have two targets on my rod and as is my personal habit—

Q. Yes?

(Testimony of H. P. N. Birkinbine.)

A. —I would first signal to him or maybe I would have an agreement with him to set his bottom target on one foot even.

Q. Now, what do you mean by the target, Mr. Birkinbine?     A. This red and white target.

Q. Yes.

A. —The center of which is marked by the difference of color.

Q. Yes.

A. I would have him set that on one foot even, very likely, of course, we would not have things as clear in the field as they are and the bottom rod would not be visible because of underbrush, now, so I would have him set it on one foot even, then I set my instrument so that the lowest horizontal hair [605] crosses this target—the lowest horizontal hair that is visible in the telescope.

Q. That is, you mean your plane or horizontal plane would be looking between—you would make your instrument of that level?     A. Yes, sir.

Q. That is all right.

A. Now, there would be one cross-hair here, say, that would be looking that way?

Q. Yes.

A. Then, I have him move the other target up the rod until the position of it coincides with the topmost cross-hair.

Q. Yes.

A. Now, my instrument, if this distance reads 7.83—

(Testimony of H. P. N. Birkinbine.)

Q. Yes. That is, now that is the distance on your staff.

A. That is the distance is the height of the top target.

Q. Yes.

A. Now, that would be 6.83. I have to subtract one foot. That would be six hundred and eighty-three feet from the focal distance of my lens. You see it—

Q. Yes.

A. —it is a very slight cross; I have to set one foot or twenty-five one hundredths to that; and in looking from here to B. M. Behrends' store you will notice that is not on the level; I have got then to calculate what the horizontal distance would be.

Q. Yes, I see. I meant providing things were all on a level. I didn't question you to take into consideration the hill, but, of course, if you were on a hill and another place was lower down you would have to make calculations to meet that condition? [606]

A. Aside from correcting for your focal length.

Q. Well, now, the real method of calculation and so far as mathematics is concerned is that you get what you call an isosceles triangle, you would have your angle, then that point there, you would have the base line, and you take up a mathematical calculation—calculate the distance in that way instead of using this, what is it, the rule? A. Stadia.

Q. —instead of the rule you went by. Haven't you some rule to go by that you indicated to the Court? Just now you did—technically, something



(Testimony of H. P. N. Birkinbine.)

there to multiply. Where did you get that rule from?

A. Well, I got the rule, I suppose it is theoretical; a man by the name of Stadia got up. It is common in engineering books.

Q. Well, do you know the mathematical principle that underlies such rule? A. The stadia?

Q. Yes, sir.

A. Yes. It is the case of the topmost hair line of an instrument and the bottom-most hair line of an instrument are set such a distance apart that the proportion of feet that read on a rod gives the distance—gives one one-hundredeth of the distance from your instrument; that is, of course, the hair lines have to be set very fine in order to bring that down because it is gotten on the focal theory that the further away anything gets the smaller it gets.

Q. Yes, that is true. But I want to know have you got a rule to go by, there must be some rule for that rule, some mathematical principle underlying this rule? A. This stadia rule?

Q. Yes. [607]

Mr. JENNINGS.—We object to this, if the Court please, as not cross-examination.

Mr. WINN.—Why, it is.

Mr. JENNINGS.—Just a minute; just let me state; Mr. Hill stated that he used triangulation and the stadia measurement, Mr. Birkinbine stated that he didn't use the stadia measurement, I asked Mr. Birkinbine whether the stadia measurement was under ban by the Department, he said "Yes," now,

(Testimony of H. P. N. Birkinbine.)

not why it is under ban. We never went into it and don't care anything about, and I think the cross-examination here is about—is examining this man on what stadia is and how it is defective and all about it, how and what is the underlying mathematical principle of the things I never went into and don't care anything about; the only thing that was gone into and drawn out, simply Mr. Hill first stated he made his measurement by triangulation and stadia, Mr. Birkinbine stating that he never used stadia measurements. I asked him whether the stadia measurement was under ban by the Department; he said “Yes”; now that is all.

COURT.—Well, it is fairly connected with that examination, Mr. Jennings, ought to find out why it is under ban.

Mr. JENNINGS.—He has not asked that question.

Mr. CHENEY.—What is the difference?

COURT.—Why isn't it accurate?

Mr. JENNINGS.—He asked him why the Department has put stadia measurement under ban.

COURT.—That isn't Judge Winn's question but it will bear on it.

Mr. JENNINGS.—That is the question he is going into.

COURT.—Yes. [608]

Mr. JENNINGS.—He can't ask him anything about why it was put under ban or what it was. I didn't ask Mr. Hill what the stadia was or anything of that kind. He simply said that part of his meas-

(Testimony of H. P. N. Birkinbine.)

urements were by stadia measurement and part by triangulation.

COURT.—That is true, Mr. Jennings, but the inference would be that the stadia measurement is not reliable.

Mr. JENNINGS.—All right; let him put Mr. Hill on the stand in his case in rebuttal and show that it makes no difference whether stadia or triangulation—I didn't ask this witness anything about it; that is part of his case not part of ours.

COURT.—No, I think it is fair cross-examination; if the witness says he knows no reason why it should be under ban or if it should be repudiated as a method of measurement why I think it is fairly cross-examination.

Mr. WINN.—I am not going very far with it.

COURT.—I don't know how material it is but I think it is fairly cross-examination.

Q. (By Mr. WINN.) Now, you understand the question, then. I am not going very much further with this, Mr. Birkinbine. A. Yes, sir.

Q. Just ask—I just want to get it in other words that triangulation—there is a great deal connected with surveying—in connection with that method of surveying and in fact all of your principles underlying, your surveying is figured out by geometry or trigonometry or some mathematical calculation?

A. Yes, sir.

Q. Now, there is some reason for all those rules, as I understand, that you have such a rule as you mentioned a while ago. Now, I will ask you if you

(Testimony of H. P. N. Birkinbine.)

know of the underlying rule [609] of mathematics controlling the calculation of the distances by this principle or method of surveying, that is of— A. By stadia?

Q. Yes, sir.

A. Well, I would say that stadia is merely a triangulation where your base line is the number of feet that you have measured on the rod between your two cross-hairs. Therefore, it is a triangulation system where your base line is one one-hundredth of the distance you wish to measure. As a rule, it is one one-hundredth. Some instruments may be different but I never heard of one anything except, Judge, for instance, one two-hundredth or one four-hundredth, will be the ratio of one to four hundred or one to two hundred, or even one to eight hundred. I believe I saw a hair line one time.

Q. Yes.

A. But in ordinary surveying. I had a position one time—

Q. That is the principle? A. Yes, sir.

Q. I don't care—

A. I had a position one time, wouldn't allow me to make a triangulation where my base line was less than one-quarter of the distance of the desired measurement as I was—

Q. I understand. I don't care about that. I just want the underlying principles, not the faults; we will get at the faults of the same—

A. It is a principle of triangulation, sir.

Q. It is a triangulation, isn't it?

(Testimony of H. P. N. Birkinbine.)

A. Focal triangulation.

Q. In other words, you can so arrange your instrument that you have the distance of the base line and then you have an angle that you make in your instrument to get your angle, [610] don't you?

A. Yes, sir.

Q. And then you can make of it an isosceles triangle and then you would calculate the distance on a mathematical principle as a perpendicular line going from your instrument and intersecting your stake at right angles; that is the old principle, mathematical principle, isn't it?

A. Yes, there will be a horizontal line and a perpendicular line.

Q. That is your method, anyhow, it is triangulation, having an angle and a base line, and what else, what else do you need?

A. A focal length of the instrument.

Q. Yes, sir. Well, then, from that there is a mathematical calculation can be made.

A. There is.

Q. That is the underlying principle of that theory?

A. Yes.

Q. Now, then, your other theory of triangulation is that you go in the first instance as you say you did and you put your instrument down on one point— A. Yes, sir.

Q. —and you look at your object—

A. Yes, sir.

Q. —and you say you get an angle?

A. Yes, sir.



(Testimony of H. P. N. Birkinbine.)

Q. And then you move on down and take a base line to another point looking at the same object and you take the angle, don't you?     A. Yes.

Q. Now, then, if your base line in that case is short and your object that you are looking at is far away you would meet [611] with some trouble there, wouldn't you, you would want a pretty good size base line in order to calculate this distance accurately because this point up here at the sharper of your angles would be on that shore?

A. Yes, the longer the base line the better the job.

Q. Yes. Now, I will ask you if this method of surveying by this staff, taking the angle you have given, isn't thorough—it is used frequently in short distances?     A. Stadia, you mean, sir?

Q. Yes.

A. Well, it all depends upon what kind of work and what kind of orders you are working under.

Mr. WINN.—That is all I want to ask you.

COURT.—Any redirect examination?

#### Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Birkinbine, I don't know but what I misunderstood your answer to Judge Winn's question this morning in regard to your experience in the construction of wharves. I want to ask you if you meant to say that you had never had charge of the construction of a wharf?

A. No, I didn't mean to say that.

Mr. WINN.—Well, we admit he never testified to, your Honor—it has been covered two or three times—if it will shorten the record.

(Testimony of H. P. N. Birkinbine.)

Q. (By Mr. CHENEY.) Well, I will ask you now if I understood you never had the sole charge of the construction of a wharf from its beginning to its completion—that is your answer?

A. I think I did answer that, Mr. Cheney.

Q. Well, now, has anything occurred to refresh your memory on that—would you care to state anything in regard to whether [612] or not you had done so?

A. It does seem kind o' queer, Mr. Cheney, that I should have forgotten a little job I was on probably, I suppose, three weeks; it was off Vashon Island; I had complete charge of the locating and driving and building and completing a wharf and I was the sole man in charge. I had no one but the president of the company over me. I don't know how that escaped my memory, but it is a fact.

Q. That is in addition to what you said you had done on other work in different parts of the United States and Alaska?

A. Yes, just one of the jobs.

Recross-examination.

Q. (By Mr. WINN.) Well, then, in doing that, Mr. Birkinbine, you went and selected the spot yourself for the building of the wharf and made your soundings and ascertained the kind of bottom and did all that preliminary work, did you?

A. Yes, sir; all the instructions that my employer gave me was showing the limits of the tidal property that he had just purchased and requested me to find out the most feasible place for driving and there was a—a master of a boat around the Sound that went

(Testimony of H. P. N. Birkinbine.)

with me. I think he was the master of a boat, to— with regard to the navigability—to the navigating to the wharf; of course, I didn't know anything about that.

Q. So you would get the face right and things of that kind?

A. No; so to pick, I think, a place out that we wanted to have and such as that.

Q. And that was to where it would go and you also took steps to ascertain the kind of bottom it was, and so forth? [613]

A. Yes, I made some borings and then I examined it at low tide as best as I could; we made, I think, two borings with the drill just to see the penetration we would get.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Birkinbine. Any other witness, Mr. Cheney?

Mr. CHENEY.—I want to introduce this notice that was served by Mr. Barker, the notice that Mr. Barker testified to that he served on Mr. Alexander in March of last year, March, 1911; it was introduced at the other trial of the case.

Mr. WINN.—Let me see it, Mr. Cheney. I have never seen it.

COURT.—Any objection?

Mr. CHENEY.—Well, Mr. Barker said he served this notice. I will call Mr. Barker just for a second. Will you come and look at this notice, Mr. Barker? [614]

[**Testimony of Fred Barker, for Defendant (Recalled).**]

FRED BARKER, heretofore duly sworn, being recalled testified as follows on behalf of the defendant.

Direct Examination.

Q. (By Mr. CHENEY.) Is that the notice, Mr. Barker, that you served on Mr. Alexander at the time you testified to in this case yesterday?

A. It is.

Q. That is the notice? A. That is the notice.

Q. I see it is directed to the Tee Harbor Packing Company, but it was served on Mr. Alexander, was it? A. Yes.

Mr. JENNINGS.—Says “Tee Harbor Packing Company or to whom it may concern.”

Q. (By Mr. CHENEY.) But I say it is the notice you gave to Mr. Alexander? A. It is the notice.

Mr. CHENEY.—We offer it in evidence.

COURT.—Any objection.

Mr. WINN.—No.

COURT.—May be received.

Q. (By Mr. JENNINGS.) That was served by authority of Mr. Barron or the Thlinket Packing Company—you had authority to serve that from your members? A. Certainly I did.

COURT.—It may be received. [615]

**[Defendant's Exhibit No. 2.]**

Barron v. Alexander—Defts. Ex. 2—R. E. R.  
2d Trial—Barron vs. Alexander—Defts. Ex. 13—  
Recd. in Ev. R. E. R.

**THLINKET PACKING COMPANY.**

Cannery at Funter Bay, Alaska.	SALMON BRANDS.
JAS. T. BARRON, Pres. & Mgr.	"SEA ROSE," High Grade Red
M. G. MUNLY, Secretary.	Alaska.
C. T. WHITNEY, Mgr. Sales Dept.	"TEPEE," Standard Medium Red.
	"BUSTER," "PESANT," "THLIN-
	KET." Best Grade Pink.
	"ARCTIC BELLE," Best Grade
	Chum. WE GUARANTEE OUR
	BRANDS.

Main Office:

Wells Fargo & Co. Building,  
Portland, Ore.

Funter, Alaska, March 14th, 1911.

To the Tee Harbor Packing Co,

Its Agent, or To Whom It May Concern,

You are notified herewith, that, in event of your jumping any of our trap locations, you do so at your own peril. We intend to drive and fish all our locations this season, and will protect our rights at all hazards.

**THLINKET PACKING CO.**

By JAS. T. BARRON,  
B. President. [616]

Mr. CHENEY.—If the Court please, we are ready to close our case with the exception of one matter. I want to put Mr. Alexander on and just confine the questions to certain allegations in the answer that he swore to in regard to the value of the trap, as to the cost of the construction of the trap, and



(Testimony of C. J. Alexander.)

the question whether he is a citizen or not, because I apprehend that some of the things might be material.

COURT.—Very well. Take the stand, Mr. Alexander.

Mr. CHENEY.—He has already testified upon it the other time. I am not going into the questions he testified to before at all.

**[Testimony of C. J. Alexander, for Defendant  
(Recalled).]**

C. J. ALEXANDER, the defendant, heretofore duly sworn, being recalled, testified as follows on his own behalf:

Direct Examination.

Q. (By Mr. CHENEY.) Mr. Alexander, are you a citizen of the United States? A. I am.

Q. Over twenty-one years of age? A. Yes, sir.

Q. I will ask you when you—about when, if you remember, that you first examined this trap-site where your trap is now located with a view to building a fish-trap there?

A. For my usage, you mean?

Q. Yes.

A. Well, it was some time, as I remember, the latter part of November, 1910.

Q. 1910? A. Yes, sir.

Q. And you went there again, I believe you stated in your [617] examination, in January, 1911?

A. January, yes, sir, of 1911.

Q. And then the next time was the time you

(Testimony of C. J. Alexander.)

started to drive your trap, which was in March 19—  
March 8, 1911?     A. Yes, sir.

Q. And you went there before the 14th?

A. Well, I think, as I remember, I towed to Funter Bay on March the 8th, or it might have been March the 11th the first work we accomplished on the trap itself.

Q. Now, is your trap as you constructed it there in March, 1908, or 1911, as it exists to-day, over eighteen hundred feet from any fish-trap owned by the plaintiff or conducted by the plaintiff or by anybody else in Chatham Straits?     A. Yes, sir, it is.

Q. Well, I will ask you if your fish-trap as constructed in March, 1911, and as changed by the driving of the extension on the lead and your web and your wire, your entire trap as it stood there last summer while you were fishing it, was, is entirely below the line of ordinary high tide of Chatham Straits?     A. It was.

Mr. WINN.—Object to the question as leading and suggestive.

COURT.—Objection overruled.

Q. (By Mr. CHENEY.) And as it stands now without the web of this trap, is it in there below the line of extreme low tide?     A. Extreme low tide.

Mr. WINN.—Same objection; leading and suggestive.

COURT.—Objection overruled.

Q. Did you get the answer, Mr. Reporter?

Reporter.—Yes.

Q. About—O, I will ask you; did you fish that trap

(Testimony of C. J. Alexander.)

at all during [618] the season of 1911? A. Sir?

Q. You fished during the season of 1911?

A. Yes, sir, I fished it during the fishing season of 1911.

Q. You expect to operate it this year?

A. Yes, sir.

Q. Well, I will ask you to state to the Court, approximately, the cost of the construction of that trap, as it was in the fishing season of 1911?

A. Why, my books show, as I remember, approximately six thousand dollars.

Q. I will ask you whether or not this place where your trap is located there in the navigable water of Chatham Straits is or is not a valuable fishing site, catching salmon—a fish-trap site?

A. Yes, sir; in comparison with other fishing contrivances of that kind it is considered a very valuable site.

Q. Well, Mr. Alexander, when you went there and you put this trap-site—built your trap,—well, I will ask you whether or not the uplands in front of the trap which is now called survey 804 was occupied by anybody, that is, with any kind of business buildings or cannery or anything of that kind?

A. Nothing visible; no, sir.

Q. I will ask you whether or not that the upland directly in front of your trap is in your opinion of any value for agricultural purposes or for any other purposes?

Mr. WINN.—Object to it as incompetent, irrelevant and immaterial, for any purpose of the case.

(Testimony of C. J. Alexander.)

COURT.—I don't see the materiality of it, Mr. Cheney.

Mr. CHENEY.—Well, probably might not be material to show whether it was valuable for agricultural purposes or not. [619] I am not clear on that myself. But it is certainly competent to show it was not occupied by anybody when he went there and built his trap.

COURT.—He has already testified to that.

Mr. CHENEY.—I didn't know.

Mr. JENNINGS.—If the Court please, it would have a bearing this way. Here is upland absolutely of no value to anybody, neither agricultural land nor timber land, nor of any value whatsoever; the only value of the location there at all is the water in front of it as a fish-trap site; as bearing upon any other use that Mr. Barron ever expected to put it to.

COURT.—The only reason that the testimony is excluded and considered by the Court immaterial, Mr. Barron hasn't himself testified it is valuable for agricultural purposes, and he has definitely described just what he intended it for, so the Court cannot assume it is valuable for agricultural purposes or that Mr. Barron intended to use it for such purposes unless he so states, and he has not so stated.

Mr. CHENEY.—Well, all right, your Honor. One reason I asked the question because we had alleged that in our answer, and I wanted to show that these questions about putting in the house, and so forth, that we alleged in our answer, that we have showed it in testimony. That is all.

(Testimony of C. J. Alexander.)

Cross-examination.

Q. (By Mr. WINN.) You consider that, then, Mr. Alexander a pretty valuable fishing site, do you?

A. I do; yes, sir.

Q. You alleged in your pleading, I believe, that approximately that you expected to realize from it annually, well, about ten [620] thousand dollars a year?

A. Well, I alleged, I think, that my anticipation of it at that time, that that would reach that amount.

Q. Did you realize that last year?

A. Well, approximately.

Mr. JENNINGS.—Object to as not proper.

COURT.—He has already answered.

Mr. WINN.—I didn't understand what the answer was.

A. I said, approximately.

Q. And you have alleged that I think in your pleading, Mr. Alexander? A. Yes.

Q. Yes, sir. You didn't have any cannery yourself in connection with taking up this fishing site, did you? A. I didn't then; no.

Q. You have since included this fish-trap as an asset in a new company which has been organized and which you are the owner of part of the stock, haven't you?

Mr. JENNINGS.—Object to. It is irrelevant, immaterial.

COURT.—I don't think it is material, Judge.

Mr. WINN.—Well, I will take an exception, your Honor.



(Testimony of C. J. Alexander.)

COURT.—Yes, sir.

Mr. WINN.—I am going to ask you a question along that line now; I don't know what purpose they could put that to, of course, unless for the faith and if on good faith, your Honor, part of these questions may be material.

Q. Now, I will ask you if it is not a fact, Mr. Alexander—I withdraw that question—you went on this location first in November, 1910?

A. Why, first in 1910.

Q. What did you go there for then?

A. I went for the—for the purpose of looking it over, with the [621] purpose of putting a trap in the following year.

Q. What were you working for?

A. I was working for the Halibut Packing Company of Petersburg, a company in which I have a large interest.

Q. 1910? A. Yes, sir.

Q. Were you engaged in the fish business in 1910?

A. Yes, sir.

Q. What sort of fish business?

A. In the herring trade.

Q. Not in the salmon business?

A. Not in the salmon business; no, sir.

Q. You didn't go up there to look over this fishing site for herring?

A. No, no; it was with a view to fishing salmon.

Q. And you was connected, then, with a company at Petersburg?

(Testimony of C. J. Alexander.)

A. Yes, sir; connected with the Halibut Packing Company.

Q. Well, did you stay—remain with that company in 1911?

A. Why, yes, sir; we operated in 1911.

Q. You took up this fish-trap in 1911 solely for the purpose of selling the fish of it?      A. Yes.

Mr. JENNINGS.—Object; irrelevant, incompetent and immaterial.

COURT.—He may answer that question.

A. Why, I sold the fish out of it, yes, sir.

Q. (By Mr. WINN.) You didn't have any cannery yourself?      A. No.

Q. You didn't pack?

A. No, sir; I didn't locate it with a view of canning the salmon myself in 1911.

Q. But you have made arrangements since then by which you expect [622] if you use the trap to use the fish in your own cannery?      A. Yes, sir.

Q. How many fish sites have you?

Mr. CHENEY.—I don't think that is material, if the Court please, and I object to it on that ground.

Mr. WINN.—They asked Mr. Barron that.

COURT.—No, I don't think it is material; if you had objected to it the Court would have excluded it. It don't make any difference how many other fish sites this man has.

Mr. WINN.—I didn't object to the question when Mr. Barron was asked about it.

COURT.—I don't see how that shows the good faith of this particular man.

(Testimony of C. J. Alexander.)

Mr. CHENEY.—I asked Mr. Barron about how many fish-traps or locations he owned and was ruled out.

COURT.—No, but some evidence to that effect was admitted, but the reason it was admitted was because it wasn't objected to. Might show that this witness had half a dozen; might show also that he hasn't shown good faith in reference to it. It wouldn't prove anything in regard to the questions.

Mr. WINN.—I think it is really important in view of some of those questions they drew out from Mr. Barron, but if your Honor views it that way, I will stop it right away.

Q. Now, then, Mr. Alexander, this is the first fish-trap you have owned in Alaska, isn't it?

Mr. JENNINGS.—Object to it, isn't cross-examination, and immaterial and irrelevant.

COURT.—I don't see the materiality of that, Judge Winn.

Mr. WINN.—Well, I will take an exception, your Honor.

COURT.—Yes, sir.

Q. You had fished this trap-site for the Alaska Packers' Association prior to taking it up yourself? [623] A. Yes, sir.

Q. Do you know whether they fished it in the year 1910? A. Why, no, they did not.

Q. When did they fish it last?

A. Fished it in 1908.

Q. And I believe that is the time you stated you drove a trap for them? A. Yes, sir.

(Testimony of C. J. Alexander.)

Q. And you worked for them that year?

A. Yes, sir.

Q. Now, Mr. Alexander, you knew that Barron was claiming this as a fish-trap site when you went in there and commenced to drive, didn't you?

A. In a way, I know that Mr. Barron and the Pacific American Fishing Company is claiming practically all the valuable fishing ground in Chatham and Icy Straits.

Mr. WINN.—Well, now, I move to strike out his answer, your Honor. This witness is volunteering this and he is doing it for a purpose.

Mr. CHENEY.—You brought the answer out and now you move to strike it.

COURT.—The question, Mr. Alexander, is with reference to this fish-trap, isn't anything you know about his claim, or if you know the merits of his claim to this.

WITNESS.—Well, the question again, Judge Winn.

Q. (By Mr. WINN.) Just read it over there; if you will answer my question? A. I will try to.

Mr. CHENEY.—I think he answered.

Mr. WINN.—Well, the Court has ruled he didn't.

COURT.—Yes, he answered the question finally, Mr. Cheney, and included other matters. [624]

Mr. WINN.—I move to strike out his answer, not being responsive.

COURT.—May be stricken.

Mr. CHENEY.—If the Court please, I think he has a right—he said in a general way he knows it.

(Testimony of C. J. Alexander.)

Now—he is simply explaining the way he knew it was that Mr. Barron and the Pacific-American Fisheries were claiming a great many such traps and the way they were claiming this; it is explanatory is all.

COURT.—That is not material at all.

Q. (Read by Reporter.) Now, Mr. Alexander, you knew that Barron was claiming this as a fish-trap site when you went in there and commenced to drive, didn't you?

A. I knew that Mr. Barron was one of the claimants of it, yes, sir.

Q. (By Mr. WINN.) You saw the sign stuck up on those piles with Barron's name? A. Yes, sir.

Q. When you went there? A. Yes, sir.

Q. Now, there could not have been any mistake, Mr. Alexander, about your knowing Barron was laying claim to that fishing site when you went out there to drive this there?

A. Why, there was no question in my mind, as I say, but what he was one of the claimants of the place with a view to building a fish-trap there.

Q. Yes, that is what I wanted to find out. Now, we have got an answer to that. A. I see.

Q. When did you first find that out?

Mr. JENNINGS.—Well, now, I think, if the Court please, that is immaterial and irrelevant, if the Court please, and not cross-examination. [625]

COURT.—I don't see how material it is. He may answer.

A. Why, I think I knew that he pretended to have some claim to this place as early as 1909.



(Testimony of C. J. Alexander.)

Q. Yes. You knew that soon after you left the service of the Alaska Packers' Association, did you?

A. I knew that he went there with his pile-driver and drove a pile or two about that time.

Q. That is what I wanted to find out.

A. Yes, sir.

Q. Now, you say that this trap cost in the neighborhood of six thousand dollars to put it in? It cost pretty nearly that much to rebuild it every year, won't it?

A. Well, the expense of building it this year wouldn't be as great, perhaps, by a thousand dollars, maybe, as it was last year.

Q. Now, when you answered six thousand dollars to the question as propounded to you by your attorney, you meant that meant after the trap was fully equipped for fishing? A. Yes, sir.

Q. Web and all? A. Yes, sir.

Q. Now, then, I wish you would state to the Court whether or not you had the cable that is stretched from the last pile in your lead closest to the shore, if that cable didn't run from some timbers or something set up making a kind of cross-bar and then went on back of that and was attached to something. Is that the way your cable was upon which your web was strung?

A. Yes, sir; the cable ran from the last pile over a pair of shears indicated as you have described and fastened to a boulder on the beach down near low-tide mark. [626]

Q. Now, this fastening to the boulder on the beach

(Testimony of C. J. Alexander.)

was above the line of ordinary high tide?

A. It was below the line of ordinary high tide, I am sure.

Q. You are sure of that?

A. I know it positively.

Q. Well, you heard Mr. Dudley and Captain Mason testify about that being on the upland?

A. I am not basing my answer on what Captain Mason or Mr. Dudley said.

Q. Well, if they testified to that they are mistaken about that.

A. They surely are if they testified above high-water mark.

Q. Now, you testified yesterday, Mr. Alexander, that Mr. Cheney had advised you in running that line out you could run it clear on out and attach it to the upland if you wanted to; didn't you state that?

A. Nothing to prevent it; he advised me so far as Mr. Barron's ownership was concerned at that time.

Q. Now, isn't it a fact, in pursuance to that advice, you went out there and did complete that line to your trap and did go out on his upland and attach this cable?

A. It wasn't at Mr. Cheney's advice that I put this addition to this trap that is the extension from the piles in shore, at all.

Q. Didn't you state yesterday it was on his advice that you considered running it out and putting it in?

A. I stated it was his advice that I could do it if I so wanted to, sir.

(Testimony of C. J. Alexander.)

Q. Well, you didn't do it, until after you got that advice from him, did you?

A. No, I didn't go to the ground. I wasn't upon the ground at all until after I had that advice given, after the service [627] of this injunction.

Q. Yes. Well, now, didn't you state yesterday to the Court—just answer this positively—if you didn't state to the Court yesterday that you did act upon the advice of your counsel after the hearing was had upon that motion to dissolve the preliminary injunction and you went out there and constructed this out the way you did?

A. It was partly upon the advice of my counsel, yes, sir. I should not have done it without some legal advice on the matter.

Q. Then, in the first instance, when you constructed your trap out there in the condition that you did construct and the condition it was in when you testified here in that hearing on the preliminary injunction, you at that time thought that you had no right to go out any further with that lead?

Mr. CHENEY.—We object to it, your Honor; at that time, wouldn't make any difference.

COURT.—That is not material. The question was where he had actually built to; doesn't make any difference what he thought.

Q. (By Mr. WINN.) You knew at the time the motion came up for a dissolution of that temporary restraining order that if your lead was extended into the shore the way it is now that it would obstruct the

(Testimony of C. J. Alexander.)

reaching of Barron's claim from the waters of Chatham Straits?

Mr. JENNINGS.—Object to it as not proper cross-examination and immaterial and irrelevant.

COURT.—He may answer that question.

A. No, can't say that I did.

Q. (By Mr. WINN.) Why didn't you construct that lead out there, then, before you got Cheney's advice on it?

A. Well, I explained to the Court—I think my testimony here [628] yesterday, that I ran into very hard substance at the termination of this row of piling that were driven there before the injunction was served on me and that, basing my opinion from it—from the end of the Alaska Packers' trap or where the Alaska Packers' lead was finished, and that it was as far as I would be able to continue this lead towards the beach.

Q. Well, but you knew that the Alaska Packers' Association Company's trap had a longer lead on it than you had on your trap then, didn't you?

A. Well, I testified, I think, that the Alaska Packers' trap as it was fished in 1908 wouldn't come within two hundred feet or over as near the shore as the one I have there at the present time.

Q. Well, just answer the question, if you didn't know that the Alaska Packers' Association Company's trap had a longer lead to it along virtually the same line your lead is now than your lead was at the time of the dissolution of the temporary restraining order in this case?

A. Well, I am under the impression that it was a

(Testimony of C. J. Alexander.)

little longer, Judge Winn, from the fact that I thought that the trap continued off there further, but I didn't think it was any longer on that end, that is, the eastern, in nearest the beach, than my lead would be at the time the restraining order was served.

Q. Just one more question, if the Court please; maybe I asked it before but I will submit it, anyway. Now, then, you did testify on that hearing before Judge Lyons that you had driven in your lead as far as to the shore as you can drive it, didn't you?

A. Yes, sir; I think the substance of my testimony was that.

Q. O, what proportionate part of the six thousand dollars would [629] you say would go to make up the web of this trap and what part the putting in of the piles?

A. Why, that is something I am very conversant with. Offhand, approximately—

Q. Approximately is all right.

A. —approximately, material would cost two thousand dollars for this trap, that is the material. Chains and iron, wire and everything in connection, without the piling for it, would cost something less than a thousand dollars, I should judge, which would make the cost of three thousand dollars. I was nineteen days; I would have that expense in the driving of it.

Q. That is all.

Mr. CHENEY.—Let him answer.

Mr. WINN.—I don't care anything about it.

COURT.—It isn't material, if counsel doesn't want it.



(Testimony of H. P. N. Birkinbine.)

Mr. WINN.—I don't want it. That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Alexander. Any further testimony, gentlemen, for the defense? [630]

[Testimony of H. P. N. Birkinbine, for Defendant (Recalled).]

H. P. N. BIRKINBINE, heretofore duly sworn, being recalled, testified further on behalf of the defendant:

Direct Examination.

Mr. CHENEY.—I would like to ask Mr. Birkinbine a question.

COURT.—Very well.

Q. (By Mr. CHENEY.) Did I ask you where the pictures on the beach were taken?

A. The large one or little ones?

Q. The little ones?

A. I think you asked me for the location of one of the little ones, I am not sure. You asked for a great many of them and I am not sure.

Q. Well, there is only two are not in evidence?

A. Yes.

Q. Well, I wasn't sure. One is marked Exhibit 12 and one is Exhibit 11. Exhibit 12 is 5a—No. 5a?

A. I think I can tell more—

Q. Just briefly, look at that and state where they were taken; that is all.

A. Possibly I could by taking the plat so I could know just the location.

Q. Yes, where is that plat? Now, if you will look at it right here?

(Testimony of H. P. N. Birkinbine.)

COURT.—You are referring now to Defendant's Exhibit 4, Mr. Cheney?

Mr. CHENEY.—Defendant's Exhibit 4.

Q. If you will point out so the stenographer can tell from what you say about where these pictures were taken.

A. No. 11, I think, is the one that I testified about before. I am not quite sure of the location, and now I do believe it was a [631] little below the average high tide line due south of the capital letter "E" in "South 79° 51' East," which is also a little southeast of corner No. 1, meander corner, and the picture looks east by a little north.

Q. All right; now, describe No. 12?

A. No. 12 is taken a little further to the east, probably twenty or thirty feet to the east than No. 11 was, maybe a little more than twenty or thirty feet, about under the figure "4" or "405.8 ft.," which is the distance on the western meander line. Is that located good enough?

Q. Of survey 804?

A. Of survey 804; and the picture looks—the direction of the camera is, well—is east by a little north. I can't give the exact direction in figures of course.

Q. Yes.

A. Let's see; that is one that shows—

Q. A big boulder. Well, just explain that. Finish your answer referring to this. But it is numbered—

A. Yes.

Q. —but Exhibit No. 12?

A. Exhibit No. 12 can be linked with Exhibit No.

(Testimony of H. P. N. Birkinbine.)

6 by the big boulder which is common to the two pictures.

Mr. CHENEY.—That is all, Mr. Birkinbine.

Cross-examination.

Q. (By Mr. WINN.) Let's see those two. Which was it? A. Right there.

Q. O, yes. On one of these I asked you this morning, didn't I, you remember?

A. Yes, sir, I think so.

Q. About that point out there. Now, this little one, I don't [632] believe I asked any questions about this one; I want to. I understand you to say you were out—that was taken, Mr. Birkinbine—

A. Point out on the map.

Q. I couldn't get up; Mr. Cheney and the rest of them were around. Tell me—explain to the Court and call the point out there so that Mr. Robertson can get it.

A. Now, I could fix it pretty good if I got a scale.

Q. Just approximately.

A. All right. Well, it is about southerly on the plat below the figure "4" of the distance on the west meander line of survey 804; the figure looks east by a little north.

Q. Is that—does that picture indicate what has been referred to here as a sandy beach, in your judgment? A. Yes, sir.

Q. Does it show at all?

A. Well, of course, Judge, the little picture doesn't show it all; it shows—

Q. About what proportion of the sandy beach

(Testimony of H. P. N. Birkinbine.)

would you say, that is, approximately, Mr. Birkinbine, I don't want these things figured out, just approximately—how much of this beach of that claim now does that picture indicate—can you tell?

A. Well, may I describe this point from the place the picture was taken. It shows the beach which is directly in front of the cabin and the beach in an easterly direction to within twenty feet of where the solid rocky bluff commences.

Mr. WINN.—Now, this question may not be cross-examination, your Honor, but I presume it is cross-examination on the other question of the case.

COURT.—Very well.

Mr. WINN.—That was brought out, but I haven't thought of it [633] before.

Q. Now, Mr. Birkinbine, in your judgment, wouldn't that point there, that point along there, everything else being equal, be the natural place for the construction of a wharf or landing place on this survey? A. No.

Q. In your judgment, it wouldn't?

A. No, sir, the picture shows the bedrock, which would very likely be a very difficult place to set a wharf.

Q. Well, now, let us see; how far does that picture extend out?

A. I don't know, sir; it may be possible to put a wharf out further and top that bedrock so that only one bent would hit it but hardly probable.

Q. You know in the construction of wharves that you weight the bents. Haven't you seen them setting on solid rocks or mud sills and out quite a dis-

(Testimony of H. P. N. Birkinbine.)

tance on the approach of the wharf?

A. I have seen whole wharves, Judge, built out that the piles were weighted, but they were very expensive.

Q. Yes. Now, all you know that would have to be done here in the way of construction of an approach to the wharf would be that between the line of ordinary high tide or—yes, ordinary high tide and the line of low tide, that part of the ground that you assume you could not drive any piles, you would have to weight it on the rocks or weight them on some kind of mud sills or blast it or something of that kind?

A. Yes, sir, for a distance of about two hundred and fifty feet.

Q. And there is a distance of two hundred and fifty feet between the line of ordinary high tide and the line of low tide? [634]

A. But very probably you would have to either weight the dock or blast holes to set the piles in.

Q. Now, when you told about building a wharf over on the east you didn't know anything about the shore line except at ordinary tide and at high tide; that is all you knew about the shore there?

A. Yes, sir, except I have seen on the bedrock there.

Q. You have seen on bedrock there?

A. Yes, sir.

Q. And how far did you estimate that the wharf can be built out on that line? Would an approach have to be built otherwise than by driving piles?

Mr. CHENEY.—You mean the east end?



(Testimony of H. P. N. Birkinbine.)

Mr. WINN.—Yes.

A. I answered that yesterday, Judge.

Q. Well, Mr. Cheney asked you about this. This is the first time I have cross-examined you on that subject.

A. Yes, sir, I will have to go out in the jury-room and get my scale.

Q. I don't care for the scale. Tell us approximately. A. It is pretty hard to guess.

Q. Approximately?

A. How much water do you want?

Q. Well, I say how much of the shore line there is there—I will ask you this question first: how much shore line is there between the line of low tide and the line of ordinary high tide—did you measure that?

A. How is that, sir?

Q. How much shore land is there between the line of ordinary high tide and ordinary low tide over on the east end of the survey?

A. That would have to be by square feet or acreage? [635]

Q. O, I mean when you go down from upon the upland.

Mr. CHENEY.—He means the distance.

A. The distance between ordinary high tide and ordinary low tide?

Q. (By Mr. WINN.) Yes.

A. O, it is one hundred feet.

Mr. CHENEY.—He means on this end.

A. Which end?

Q. (By Mr. WINN.) I mean over on here?

A. I beg your pardon.

(Testimony of H. P. N. Birkinbine.)

Q. That is what I am talking about now.

A. I beg your pardon; one hundred and twenty feet ordinary high and ordinary low.

Q. You have got two hundred feet?

A. No, sir; this is extreme low, Judge.

Q. O, you are taking ordinary and I say extreme low tide and ordinary high tide?

A. Extreme low tide and ordinary high tide—well, that is about two hundred feet—it is a hundred and eighty feet.

Q. You are simply estimating that, aren't you?

A. Yes, sir.

Q. But you testified this morning to the Court you didn't make any measurements and didn't pay any attention to this east side?

A. I said I paid attention down as low as the average low tide.

Q. Didn't you testify to the Court this morning these lines you ran out there you didn't take any particular notice of that side?

A. As far as down to the ordinary low tide I took elevations, Judge; I think that was what I testified to. It was my intention to, anyhow. [636]

Q. Well, I didn't understand you so. Let's see now, Mr. Birkinbine. I thought you said this morning that you didn't pay any attention to this east side, that you went out there to get data about this other side of the trap. Now, of the—what data did you get in this section of the tide lands in front of the easterly end of this claim?

A. I accurately obtained the topography of the shore line in front of that claim as—well, it is as

(Testimony of H. P. N. Birkinbine.)

accurate down to the approximate low average low tide as the other side is.

Q. Well, what did you do that for when you said this morning that you didn't make any examination over there because you thought all the examination you was called upon to do was on this other side of the trap?

A. That was with reference to the soundings.

Q. Yes.      A. On the west side.

Q. Yes.

A. I supposed with reference to the soundings at that time; this is with reference to the topography of the shore, Judge.

Q. Did you go out there to ascertain whether--whether a wharf could be built out from the east end of that survey, Mr. Birkinbine?

A. No, it wasn't my intention of looking for a wharf site when I was there, no, sir.

Q. No. And so far as the building of a wharf at that end you didn't go out there for that purpose?

A. I didn't go out for that purpose but when I saw the bedrock my mind went to the interests of the man who was employing me, I would look on this side and see if I could see bedrock.

Q. See bedrock. You did observe, though, as between the line of [637] the fish-trap and the westerly end of the claim as to whether it would be a good place to build a wharf in there? You examined into that, did you?

A. Well, I didn't go out for the purpose of that, no such purpose at all, but I examined into it after I got there.

(Testimony of H. P. N. Birkinbine.)

Q. Well, you got the data concerning that water-front along in there the same you did along the other side?

A. Yes, sir; that is, concerning the soundings in the water, not concerning the shore line. One shore line is as complete as the other.

Q. I see. Then what is the difference between, the difference from the line of high tide on the easterly end and the line representing extreme low tide and the distance between the same two lines on the other side?

Mr. CHENEY.—If you want to examine him let him get a scale.

Mr. WINN.—O, approximately.

Mr. CHENEY.—I would like to have him get his rule.

COURT.—Well, if counsel only wants it approximately I presume he won't need his scale.

A. Well, of course, it is approximate; we will get the distance between extreme high tide to extreme low tide on the east side of the claim.

Q. Yes.

A. Of a probable wharf-site on that side?

Q. I don't care about wharf-site; I haven't asked anything about the wharf-site; I was asking you to give me the distance.

A. In a due southerly direction then?

Q. Yes, sir.

Mr. CHENEY.—From what?

Q. (By Mr. WINN.) I asked it.

A. From extreme high tide to extreme low tide, two hundred and [638] sixty feet.

(Testimony of H. P. N. Birkinbine.)

Q. Well, now, what is it over on the other side? That is, just about the same distance from the eastern end line as you have measured this distance from—

A. Yes, sir; well, we will start from the extreme high tide?

Q. Yes.

A. And you want to go due south in the same direction?

Q. Yes.

A. As the other one was. We will measure from just below the location of pictures 3 and 4, which would fix the position of this point; why, high water—extreme low tide—just three hundred feet.

Q. Isn't much difference in those distances there. Now, you want the Court to understand, then, on the eastward, on the eastern end across this shore land that you have just testified concerning that you could drive piles?

A. I think it would be better driving, in my judgment, would be better driving from what I have seen.

Q. Well, now, you wasn't examining it in regard for a wharf-site and therefore you could not testify positively to the Court whether would be better driving on one side or the other?

A. You asked me, Judge, if I went there for the purpose of examining it for a wharf-site—

Q. Yes, but I say—

A. I did examine it for a wharf-site after I got there.

Q. O!

A. That is what I could see on the beach. Made a reconnaissance of it, if you wish to call it so.



(Testimony of H. P. N. Birkinbine.)

Q. Well, who told you to examine it for a wharf-site?

A. Why, Mr. Alexander told me that one contention in the suit was that they were going to build a wharf and so I thought [639] it was up to me to do what I could to the interests of my employer.

Q. But you don't want the Court to understand, Mr. Birkinbine, that you made such an examination there you could swear positively that the driving of piles would be any more difficult on one end than the other but just simply giving it as your judgment, do you?

A. I want the Court to understand that I have very reasonable ground for that judgment.

Q. I know. Do you want to swear positively this would be harder on one side to drive piles than the other, or is it your judgment? Now, which one do you want to swear to?

Mr. CHENEY.—Can't swear to anything more than his judgment.

Mr. JENNINGS.—Nobody has ever driven piles on either side.

Mr. WINN.—Well, now, help him all you can, gentlemen, and when you get through let him answer.

A. Well, of course, Judge, I had no diamond drill along with me.

Q. No, you didn't—you didn't do anything along to find out about the rock—how deep it was, how far have to drive in one place to get through it or how far in the other place, did you—just made an ex-

(Testimony of H. P. N. Birkinbine.)

amination of the surface of the ground?

A. I made a reconnaissance, as I have stated before.

Q. That is an examination of the surface of the ground— A. Yes, sir.

Q. —that you saw exposed, and that is the only examination you made now? A. Yes, sir.

Q. And that is what your view is based upon?

A. Certainly.

Q. Yes. That is all. [640]

Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Birkinbine, I just want to ask one question. In addition to what you have stated to the Court that your judgment is based upon and the opinion you have given to Judge Winn, now, I will ask you that in answering the question whether he stated that the plaintiff's witnesses had sworn that the water was deeper in front of the east end of the claim than over on the west end of the claim, you took that into consideration in stating to the Court that you thought this would be the best site to build a wharf?

A. Yes, Mr. Cheney, I understood that question in two distinct divisions; first—

Mr. CHENEY.—We don't care for the answer again.

Q. As you took the depth of the water into consideration when stating this would be the cheapest and most economical and best place to build a wharf, in front of the east end, you took into consideration that he had stated that their witnesses had testified

(Testimony of H. P. N. Birkinbine.)

that the water was deeper over here than it was over there?      A. I did.

Q. The difference in the lines as you have approximated them to Judge Winn is only something like forty feet in favor of the east side, that is of this—I say the way you have approximated here between these lines—      A. Yes, sir.

Q. —would be about forty feet less over here?

A. Yes, sir.

Q. But if it is a fact that the water is much deeper over here then a wharf would necessarily be much shorter than it would over here where the water is shallower? [641]

Mr. WINN.—Same objection. I think he has answered two or three times.

COURT.—I think he has answered.

A. Of course, I would like to explain about the measurements if I might that I made for Judge Winn. These measurements were made in a due southerly direction—you can see where the rule was laying, in a due southerly direction from the position of the pictures 3 and 4.

Q. (By Mr. CHENEY.) Yes?

A. Would be no wharf-site because a logical site—I only found one site to the wharf—you would have to come out a little or go in to opposite the cabin in order to get the two sides of your wharf and therefore you have got to go out on an oblique angle which would make the distance longer.

Q. Make it much longer than three hundred feet which you have stated?      A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

COURT.—Any further questions, Mr. Cheney?

Mr. CHENEY.—That is all.

Re-recross-examination.

Q. (By Mr. WINN.) You know nothing about the tides and the winds, whether or not one place would be a better place to land or anything of that kind?

A. I am not a steamboat man.

Q. You didn't take any of those things into consideration?

A. I know there must be a tide rip around the peninsula.

Q. But, I say, in answering the question of Mr. Cheney's about the proper place to build a wharf there, you didn't take these principles of navigation into consideration at all, [642] did you?

A. No, I took nothing into consideration but the topography.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Birkinbine. Any other witnesses, gentlemen?

Mr. CHENEY.—We rest our case, your Honor.

COURT.—Any rebuttal, gentlemen?

Mr. WINN.—If your Honor will give us three or four minutes until I see Mr. Burton.

COURT.—Very well, gentlemen, take a recess for ten minutes.

After Recess.

Mr. WINN.—We rest.

COURT.—Let the record at this time show that the plaintiff also rests. [643]

**Certificate.**

United States of America,  
District of Alaska,  
Division Number One,—ss.

I, R. E. Robertson, do hereby certify that I am the Official Court Reporter for the District Court for the First Division of the District of Alaska; that the foregoing and hereto attached pages of typewritten matter, numbered from one to five hundred and fifty-eight, both inclusive, is a full and complete transcript of the extensions of my shorthand notes taken of the evidence adduced at the trial of said cause.

Dated at Juneau, Alaska, this first day of July, 1912.

R. E. ROBERTSON,  
Official Court Reporter. [644]

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*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Findings of Fact and Conclusions of Law.**

This cause coming on for trial before Honorable Thomas R. Lyons, Judge of the above-entitled court, and the plaintiff having introduced all of his testi-



mony and evidence, and the defendant having introduced all of his testimony and evidence, and each party having rested his case, and the Court having heard the argument of counsel representing the respective parties, and the Judge stating that he desired to visit the premises in controversy and that he would thereafter file a written opinion in said cause, and it being stipulated and agreed in open court by the attorneys representing the respective parties, and concurred in by the Court, that it would be unnecessary to render or offer Findings of Fact or Conclusions of Law herein until the Court had filed its written opinion, and now that the Court has filed its opinion herein, comes now the plaintiff and tenders to the Court for its making, signing and filing herein, the following Findings of Fact and Conclusions of Law:

I.

The Court finds that the plaintiff herein, James T. Barron, is now and has been for a good many years last past, the President and General Manager, and largely interested in [648] a corporation, known as Thlinket Packing Company, which said corporation has been engaged in the canning of salmon at Funter Bay, Alaska, and operating thereat a large salmon cannery, having a capacity of about 3,000 cases per day, and in order to supply said cannery with fish and salmon for canning purposes, said corporation owns a great deal of floating stock, fish-boats and boats propelled by steam and gasoline, fishing gear, fish-traps, fish-trap sites and fishing stations.

## II.

The Court further finds that on or about the 10th day of March, 1911, the said plaintiff purchased of the Alaska Packers' Association, a corporation engaged in the fish business in Alaska, that certain trap-site theretofore located and fished by the said Alaska Packers' Association, situated on the west coast of Admiralty Island on Chatham Straits, an arm of the North Pacific Ocean, at a point between Funter Bay and Hawk Inlet, and about four miles distant in a southeasterly direction from said Funter Bay, and about four miles distant from the cannery owned by the said Thlinket Packing Company, and located on the shore land and in a small harbor and sheltered place for steamers, gasoline boats and other water crafts used in the fishing business, and said fish-trap site was conveyed to this defendant by good and sufficient instrument in writing.

## III.

That prior to June, 1909, one V. A. Robertson, located and had surveyed, under the Soldier's Additional Homestead laws, applicable to the District of Alaska, a certain piece or parcel of shore land and upland, lying and being, and abutting upon the said harbor or cove wherein said fish-trap [649] was located, on the south shore of Chatham Straits, a navigable arm of the North Pacific Ocean, and abutting upon said fish-trap site, which this plaintiff purchased from the said Alaska Packers' Association, which said piece or parcel of land so surveyed is known and designated as U. S. Nonmineral Survey No. 804, and contains 5.27 acres; that said survey

soon after it was made was approved by the Surveyor-General, as is by law required, and the said Robertson commenced proceedings for obtaining a patent to the ground contained therein.

#### IV.

The Court further finds that on or about the 1st day of March, 1911, the said V. A. Robertson, for a good and valuable consideration, conveyed to this plaintiff by good and sufficient deed in writing all of the ground and premises contained in the said Non-mineral Survey No. 804; and this plaintiff continued with diligence the said patent proceedings before the U. S. Land Office at Juneau, Alaska, and such proceedings were had in said Land Office that before the trial of this cause final entry and proof had been made before said Land Office and a Final Receiver's Certificate issued to this plaintiff for the lands embraced in said survey. That the purchase of said fish-trap site and said ground contained in said Survey No. 804 was all made by this plaintiff prior to the defendant initiating or making any claim to said fish-trap site or shore lands, or uplands, and plaintiff now is, and was at the time of the commencement of this action, the owner of all the lands embraced in said Survey No. 804.

#### V.

That by reason of plaintiff's ownership of the lands embraced in said Survey 804, he is entitled to the exclusive right of ingress and egress between his upland and over the shore land and tide lands to the navigable waters in [650] said harbor and Chatham Straits, and is entitled to such access to said waters free and unobstructed, and from all points

of the said upland contained in said Survey No. 804.

## VI.

That said fish-trap site and ground contained in said U. S. Survey No. 804 were acquired by the plaintiff for the purpose of being used in connection with said fishing business of said Thlinket Packing Company; that during each year the said cannery at Funter Bay is operated, and it is necessary to have a great many piles, piling and timbers for the purpose of building fish-traps and keeping up of said cannery, and wharf in connection with it, and maintaining the same; it is also necessary each year, by means of said steamers and gasoline boats, to tow said piling and fish to supply said cannery, great distances, and most of said piling is obtained at a place on the uplands in a southerly direction from Funter Bay, down Chatham Straits, passing said land contained in U. S. Survey No. 804, and cove or harbor abutting thereon, and said harbor is necessary for this plaintiff to have and the same has been used by plaintiff for shelter and mooring place for his steamers and gasoline boats engaged in said towing business in connection with said cannery, and the waters in front of and abutting upon said Survey No. 804 is particularly adapted for said purpose, and the only place in which said plaintiff can seek shelter from northerly winds in the towing of said piles and fish to said cannery from points south of said harbor or cove, and the water in said harbor and the shore land abutting thereon and abutting upon said Survey No. 804 were used for said purpose long prior to the defendant making any claim thereto and are neces-

sary for said use and purpose on account of the prevailing winds during [651] the time that the said towing has to be done.

## VII.

That prior to March 14, 1911, and prior to any pretended claim made to said premises by the defendant, the plaintiff had entered upon the fish-trap site and waters immediately in front of U. S. Survey No. 804, and caused several piles to be driven and a notice placed thereon that said plaintiff owned said fishing-trap site and station, and the said defendant with full knowledge of said facts, and with full knowledge of plaintiff's rights and uses of said harbor, and ownership of said upland, did, by his agents and himself, and employees, enter upon the shore land and tide land and waterfront property immediately in front of, and abutting upon the ground contained in Survey No. 804, and the waters contained in said harbor, against the will and consent of this plaintiff, and commenced the driving of piles, and the construction of a fish-trap at a point indicated upon the blue-print or map attached to the Amended and Supplemental Answer herein by the words "Alexander Lead Line, Mar. 28th, 1911," which said blue-print or map is hereby referred to for all purposes of these findings and made a part of the same; that immediately upon said defendant entering upon said premises, as aforesaid, this plaintiff ordered said defendant from said premises, informing him of the ownership of said upland and fully explaining to said defendant plaintiff's rights in the premises, and the notice and piling of plaintiff



were at said time in place and position as above referred to, where they could easily have been seen by defendant; that notwithstanding said fact, the said defendant did continue driving piles immediately in front of the premises of this plaintiff, and the plaintiff applied to this court for a temporary restraining order against [652] said defendant, which said restraining order was granted, and thereafter on motion of said defendant and a showing that was made by said defendant that he did not intend to construct his fish-trap so that the lead thereof would come any nearer the upland of plaintiff's than the point indicated on said blue-print by the bunch of piles opposite the words, "Alexander Lead Line, May 28th, 1911," and that said fish-trap was then completed, the Court dissolved said temporary restraining order. But thereafter, the said defendant returned to said premises and continued the driving of the lead to said trap and completed the same 261 feet further in shore towards plaintiff's upland, along a line which is indicated on the said blue-print above referred to, by the row of piles along the words "Extended 261 ft. in shore," and further continued said lead from the end nearest the shore to the upland of the plaintiff by means of a strong wire cable and the hanging thereon of webbing so as to complete said lead, and the same was completed as indicated on said blue-print, thus interfering with and obstructing plaintiff's right of free access from his upland to the navigable waters of Chatham Straits, and his right of ingress and egress to and from his said upland.

## VIII.

That the construction and maintenance of said fish-trap by said defendant has obstructed, and does obstruct, plaintiff's access to the navigable waters of Chatham Straits from his upland, and has completely cut off access to his shore land from the navigable waters abutting thereon, and the using of that particular part of the shore land which plaintiff had been using prior to the construction of the said fish-trap by [653] said defendant; and the maintenance of said fish-trap does entirely cut off and prevent plaintiff from reaching navigable waters from all that part of his shore line which lies between the prolongation of the line of the lead of said trap and the westerly boundary of plaintiff's premises contained in Survey No. 804, which said last mentioned portion of shore land is best adapted for the purpose of reaching said upland and has been used, together with the water in front thereof in said harbor, for said purpose as well as for the purpose of anchoring and mooring plaintiff's steamers and gasoline boats while towing logs, piles and fish; that the construction and maintenance of said fish-trap by said defendant has and does render said harbor useless for the purpose which said plaintiff had heretofore been using the same and renders plaintiff's upland useless and valueless, and destroys all of plaintiff's waterfront property and shore land which he could erect upon or maintain a wharf, or could use for anchoring boats and other water crafts, and has completely destroyed said harbor and the utility thereof.

And as Conclusions of Law, the Court concludes from the foregoing findings, as follows, to wit:

I.

That the plaintiff is now, and has been for a long time prior to defendant initiating any right thereto, the owner of the fish-trap site, shore land and uplands contained in U. S. Survey No. 804, all of which are described in the Amended and Supplemental Complaint herein, and entitled to the possession thereof, and each and every portion thereof, as against said defendant or anyone claiming under him.

II.

By reason of the ownership of the lands contained in [654] U. S. Survey No. 804, bordering and abutting upon the navigable waters of the harbor in front of same, a part of Chatham Straits, plaintiff is entitled to free and unobstructed access to and from all points of his upland, across shore lands in front thereof, to and from said navigable waters, that by construction and maintenance of the fish-trap set out and described in the Amended and Supplemental Complaint herein by defendant, the said access of plaintiff is cut off and destroyed, and that the maintenance of said fish-trap by defendant, the said access of plaintiff is cut off and destroyed, and that the maintenance of said fish-trap by defendant constitutes a nuisance as well as destroys the usefulness of the harbor abutting upon plaintiff's upland.

III.

That the plaintiff acted timely and with diligence in applying to this Court for injunctional relief

against the construction and maintenance of said fish-trap by the defendant, and plaintiff has no speedy and adequate remedy at law herein and is entitled to a mandatory injunction requiring said defendant to remove said fish-trap and obstruction from said waters and shore land in and upon which said fish-trap is constructed, and a decree may be prepared accordingly.

Done in open court this —— day of ———, A. D. 1912.

\_\_\_\_\_,  
Judge.

[Endorsed]: No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Findings of Fact and Conclusions of Law Requested by Plaintiff. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ———. Filed Jun. 28, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [655]

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*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Motion for New Trial or Rehearing.**

Comes now the above-named plaintiff, James T. Barron, by his attorneys, Winn & Burton, and moves the Court to set aside the opinion and decision heretofore rendered in this cause and grant a new trial or rehearing herein for the following causes materially affecting the substantial rights of the plaintiff, to wit:

**I.**

The Court erred in that part of its opinion and decision wherein it held that the evidence showed that all of the structure or fish-trap complained of in the complaint was constructed below low-water mark, for the reason that all evidence showed to the contrary and that the defendant himself admitted that part of the structure extended out, in and over the shore lands in front of plaintiff's land to or above the line of high-water mark, and all of the other evidence in said cause showed that part of said structure extended above said high-water mark and in, upon and over the upland of said plaintiff.

**II.**

That the Court erred in that part of its decision and opinion wherein it held that plaintiff was able, notwithstanding [656] the structure or fish-trap, to reach all points of his upland from deep water for the reason that such finding is against the uncontradicted evidence and the admission of the defendant while he was testifying upon the witness-stand during the trial of said cause. The Court further erred in that part of its opinion and decision wherein



it stated that the plaintiff did not need a wharf, for the reason the same is against the evidence, and further, the same is a matter of immateriality, whether plaintiff had needed a wharf to reach the deep navigable water in front of his land before the erection of the trap in question, or not. That said right is appurtenant to and a part of said property right belonging to said plaintiff by reason of his ownership of the upland and that the need or necessity of the same is entirely immaterial.

### III.

The Court also erred in that part of its opinion or decision wherein it stated that since the hearing or trial of said cause, the Judge of this court visited and viewed the situs of the fish-trap and uplands referred to in the complaint, and by reason of the condition of the premises, etc., at said time, all possible question in the judgment of the Court had been eliminated in reference to said structure interfering with plaintiff's right of access from every point of his upland to navigable waters of Chatham Straits, for the reason that at the time the Court visited the premises, the evidence of the original structure or the fish-trap and the manner in which it was constructed as complained of in the complaint had been altered and changed, and the knowledge gained of the situation by reason of the Court's visit to said property could not be used as a basis of a finding against said plaintiff, and is a means of depriving [657] the plaintiff of his property or property rights without due process of law and without the plaintiff having had his day in court.

## IV.

The Court also erred in that part of its opinion or decision wherein it in substance found and held that the plaintiff, by reason of his upland ownership, was only entitled to reasonable access to his upland property from the navigable waters of Chatham Straits or entitled to reasonable ingress to and from his upland to navigable water of Chatham Straits.

## V.

Irregularity in the proceedings of the Court and abuse of the discretion of the Court by reason of the Judge thereof visiting the premises in question and using the knowledge gained thereby for the purpose of predicated a finding as against the property and property rights of the plaintiff, all of which prevented plaintiff from having a fair trial, and, in fact, the Court should have treated the actions of the defendant in destroying the condition that the trap was in at the time of trial, and the changing thereof, as a confession against said defendant, and a confession that the way that the trap was originally constructed, did prevent free ingress to and from the upland of plaintiff to the navigable waters of Chatham Straits.

## VI.

Accident and surprise materially affecting the substantial rights of the plaintiff which ordinary prudence could not have guarded against.

## VII.

Insufficiency of the evidence to justify the opinion or decision of the Court and that the same is against law. [658]

## VIII.

Error in law occurring at trial and excepted to by the plaintiff.

WINN & BURTON,

Attorneys for Plaintiff.

Due service of a copy of the within Motion for New Trial or Rehearing is admitted this 7th day of May, 1912.

Z. R. CHENEY,

Attorney for Defendant.

[Endorsed]: Original. No. 840-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Motion New Trial or Rehearing. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ————. Filed May 7, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [659]

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Notice.**

To the Above-named Defendant, Claire J. Alexander, and R. W. Jennings and Z. R. Cheney, His Attorneys:

You, and each of you, will please take notice that the motion for new trial herein or rehearing and setting aside the Findings of Facts and Conclusions of Law made by the Court, a copy of which is hereto attached and served upon you, will be called up for hearing on July 2d, A. D. 1912, at ten o'clock in the forenoon of said day, before the above-entitled court or the Judge thereof, at the courthouse in Juneau, Alaska.

WINN & BURTON,  
Attorneys for Plaintiff. [660]

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Motion for New Trial or Rehearing.**

The Court having made, rendered, signed and filed herein its Findings of Facts and Conclusions of Law, comes now the above-named plaintiff, James T. Barron, by his attorneys, Winn & Burton, and moves the Court to set aside said Findings of Fact and Conclusions of Law and grant a new trial or rehearing herein, for the following causes materially affecting the substantial rights of the plaintiff, to wit:

I.

The Court erred in making that certain finding,

wherein it held that the evidence in said cause showed, and the Court so found, that all of the structure, or fish-trap, including lead, etc., complained of, was and is constructed below low-water mark, for the reason that all of the evidence and testimony of witnesses in said cause shows the contrary, and that the lead of said trap extended above the line of ordinary high tide, to and upon the upland of this plaintiff, and that said finding made by the Court is entirely unsupported by the evidence, and, in fact, that there is no evidence to support the same. [661]

## II.

That Finding of Fact No. III, made, rendered, signed and filed herein by the Court, is entirely unsupported by the evidence, the defendant having acknowledged himself upon the witness-stand that access to a large portion of plaintiff's land from the navigable waters of Chatham Straits was cut off and obstructed by said fish-trap, and that said fish-trap did interfere with the free ingress to and egress from said land to said navigable waters; that there is no evidence to support said finding, and the same is contrary to law.

## III.

That the Conclusions of Law made by the Court are not supported by the Findings, and that there is no evidence of said cause to justify said Conclusions.

## IV.

Irregularity in the proceedings of the Court, and abuse of the discretion of the Court, by reason of having visited the premises in controversy, on its own motion, and using the information thereby obtained



as evidence in said cause, and predicating a finding thereon against this plaintiff.

V.

Accident and surprise materially affecting the substantial rights of the plaintiff which ordinary prudence could not have guarded against.

VI.

Insufficiency of the evidence to justify the Findings made by the Court, and the same are against law.

VII.

Error in law occurring at trial and excepted to by the plaintiff.

WINN & BURTON. [662]

United States of America,  
District of Alaska,  
Division No. 1,—ss.

I hereby certify that I received the within Notice on the 1st day of July, 1912, at Juneau, Alaska, and that I served the same on the 1st day of July, 1912, at Juneau, Alaska, by delivering and leaving a full, true and correct copy of said notice to Mrs. R. W. Jennings, she being the wife of R. W. Jennings, attorney for the within named defendant, Claire J. Alexander, the said R. W. Jennings being out of the city of Juneau, Alaska, and the said notices delivered to the said Mrs. R. W. Jennings at the usual place of abode of R. W. Jennings and she being over the age of 21 years of age, personally and in person.

Dated at Juneau, Alaska, July 2, 1912.

H. L. FAULKNER,

United States Marshal.

By Hector McLean.

Office Deputy.

[Endorsed]: No. 840-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Notice and Motion for New Trial or Rehearing. John R. Winn, Newark L. Burton, Attorneys for Plff. Office: Juneau, Alaska. Filed Jul. 2, 1912. E. W. Pettit, Clerk. By \_\_\_\_\_, Deputy. [663]

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Affidavit of Jno. R. Winn.**

United States of America,  
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the above-named plaintiff, and have been such since the inception of said case, and was present, aided and assisted in the trial of said cause from the beginning to the close thereof; that some time after the plaintiff and defendant had rested their case, and after the introduction of all testimony and evidence in said cause, Honorable Thomas R. Lyons, the Judge of the above-entitled court, and who presided over the trial of said cause, announced in open court, of

his own accord, and without any request of the plaintiff, and in presence of the attorneys representing the defendant, that he, the said Judge of said Court, expected to file a written opinion in said cause, but before doing so would visit the fish-trap site and upland set out and referred to in the complaint herein. That some time thereafter, and before the Judge of said Court filed his written opinion herein, he visited said premises and affiant was present at said time and accompanied [664] said Judge on his trip, and when we arrived at the fish-trap location and upland referred to in the complaint herein, the said defendant was upon the ground with several men, pile-driver and gasoline boat and had destroyed the evidence of, and the manner in which the fish-trap described and set up in the complaint herein was constructed, and was engaged in constructing another fish-trap immediately in front of the shore land and upland of plaintiff.

This affidavit is made and filed herein, to be used upon the hearing and in support of the motion to set aside the Findings of Fact and Conclusions of Law made, rendered and filed herein by the Court.

JNO. R. WINN.

Subscribed and sworn to before me this 2d day of July, A. D. 1912.

[Seal]

NEWARK L. BURTON,  
Notary Public for Alaska,

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By  
———, Deputy. [665]

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Affidavit of Jno. R. Winn.**

United States of America,  
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the plaintiff in the above-entitled cause and assisted in the trial of said cause from its inception to its close; and that I make this affidavit for the reason that the plaintiff herein cannot be reached in time to perfect this appeal before the leaving of Honorable Thomas R. Lyons, Judge of said Division No. One, Alaska, for the Westward, and hence an affidavit cannot be procured signed by said plaintiff; and that by reason of affiant's long residence in Alaska and familiarity with property and property rights of the kind in litigation in this suit, I am able to state the value thereof is more than the sum of Five Hundred Dollars (\$500), and the property and property rights which plaintiff has been denied herein by the action of the Court in rendering its final judgment or decree and in making its final order herein, and in not granting plaintiff's prayer of his complaint is a denial of

relief for and in excess of \$500.00 in value, and [666] the upland of plaintiff is worth more than \$500.

JNO. R. WINN.

Subscribed and sworn to before me this 2d day of July, A. D. 1912.

[Notarial Seal] NEWARK L. BURTON,  
Notary Public for Alaska.

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By  
\_\_\_\_\_, Deputy. [667]

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

### Opinion.

This is an action in equity to restrain the defendant from constructing a fish-trap in front of land alleged to be owned by the plaintiff.

The complaint alleges that the plaintiff is the owner and in possession of 5.27 acres of land abutting on the tide waters of Chatham Straits, an arm of the North Pacific Ocean; that some time in the year 1901 one V. A. Robertson caused said tract of land to be surveyed and thereafter such survey was approved by the Surveyor-General for the District of



Alaska, and subsequently thereafter the said Robertson sold and transferred all his right, title and interest in and to said land to the plaintiff herein; that plaintiff thereafter filed his application for patent to said tract of land in the local land office at Juneau, in the District of Alaska, and sought to procure patent from the United States thereto by means of soldier's additional homestead warrant; that no protest has been filed against said application for patent; and that said patent proceedings have been prosecuted to a final conclusion and there remains nothing further to be done by the officers of the Interior Department to transfer the title to said premises from the United States to plaintiff, except the ministerial [668] act of issuing patent thereto. The complaint further alleges that defendant commenced driving piles on the tide lands immediately in front of said tract of land for the purpose of constructing a fish-trap; and that defendant has by reason of driving said piles cut off plaintiff's right of access from his upland to the navigable waters of Chatham Straits; and that, unless restrained by this Court, defendant will continue to further drive piles in the completion of said fish-trap and entirely destroy plaintiff's access to the highway.

The defendant on information and belief denies the plaintiff's ownership of the tract of land described in the complaint; and admits that he has built and is building a fish-trap in front of said upland, but alleges that all of such fish-trap is below low-water mark; and denies that his structure or fish-trap in any way interferes with plaintiff's right of access

from his upland to the navigable waters of Chatham Straits; and he further alleges that he acquired his interest in and to the fish-trap site prior to plaintiff's alleged acquisition of the tract of land described in the complaint.

The reply puts in issue the affirmative defense set out in defendant's answer.

Messrs. WINN & BURTON, Appearing for  
Plaintiff.

Z. R. CHENEY, Esq., and R. W. JENNINGS,  
Esq., Appearing for Defendant.

LYONS, District Judge:

In the view the Court takes of the case as presented by the pleadings and the evidence, it may be conceded that plaintiff is the owner and entitled to the possession of the tract of land described in the complaint. It may further be conceded [669] that his right, title and interest thereto was initiated at the time that his grantor caused a survey of the same to be made in the spring of 1909, and that his grantor and himself prosecuted the patent proceedings described in the complaint with reasonable diligence.

The only questions, therefore, necessary to be determined in order to adjudicate the rights of the parties hereto are:

First, What right has plaintiff in the tide lands or the space between his upland and navigable waters?

Second, Is the defendant interfering with such rights in any manner?

The owner of land abutting on navigable water has by virtue of such ownership no right or posses-

sion or title to the tide land in front of such upland holdings, since the United States holds the title to all tide lands in Alaska in trust for the future state, or states, that may be hereafter carved out of and organized in this territory. But such upland owner enjoys the right of free access from his land to deep water navigation; thus affording him uninterrupted means of ingress to and egress from his holdings to the highway. The law, therefore, subjects the tide lands to the will of an abutting upland owner to the extent only of enabling the latter to control the same for the purpose of securing an easement from his holdings to the navigable waters bordering upon his upland.

“But whether the title of the owner of such lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public subject to such general rules and regulations as the legislature may see fit and proper to impose for the protection of the rights of the public, whatever those may be.”

*Yates vs. Milwaukee*, 77 U. S. 497.

“The riparian right is property and is valuable and though it must be enjoined in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested

the owner [670] can only be deprived in accordance with the established law and if necessary that it may be taken for the public good upon due compensation."

Yates vs. Milwaukee, *supra*. To the same effect, see Pacific Coast Company vs. McCloskey, 160 Federal, 794; Decker vs. Pacific Coast Company, 164 Federal, 974; Columbia Canning Company vs. Hampton, 161 Federal, 160; Dalton vs. Hazelett, 182 Federal, 561.

It will be conceded, therefore, that it is the settled law of this jurisdiction that one owning land abutting on navigable water has a right of free access from such abutting premises to the highway. But what is meant by the right of free access from such upland to deep water navigation? Counsel for the plaintiff earnestly insist that the littoral and riparian rights of the upland owner give him the privilege of preventing anyone from building any structure or in any way occupying any portion of the space between his upland and the highway, regardless of whether or not the same may in any way interfere with reasonable access from his upland to deep water and without reference to whether or not he has any need or any desire to appropriate the same premises to any beneficial use.

Section 3 of an act of Congress, entitled "An act for the protection and regulation of the fisheries of Alaska." approved June 26, 1906, provides:

"That it shall be unlawful to erect any dam, barricade, fence, trap, fish-wheel or other fixed or stationary structure except for purposes of

fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than 500 feet or within 500 yards of the mouth of any red salmon stream where the same is less than 500 feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful structures removed or destroyed."

Unless, therefore, a fish-trap comes within the denunciation of the section of the statute just quoted, it is a legal institution under the laws of the District of Alaska and entitled to the protection of the law the same as any other legitimate industry. There is no contention made here that the construction [671] of the fish-trap where located is within the inhibition of the section of the statute last quoted. It is the policy of the law to encourage legitimate industry and commerce, and wherever the right which any person enjoys under the law may be exercised without interfering with the right of another, the law prevents such interference by compelling both parties to observe the limitations necessary in order that both may successfully enjoy the privileges and advantages which the law secures to each. If, therefore, the only right which the upland owner enjoys in the tide lands in front of his upland holdings is the right to pass over the same, why should he be permitted by the law to insist that all the premises between his land and deep water



remain unoccupied and unproductive, unless such condition is necessary in the protection of his littoral or riparian right.

The United States holds the tide lands of Alaska in trust for the future state, or states, which may be erected out of this territory and the upland owner as against the United States can only insist upon his right of free access to deep water. It, therefore, cannot be successfully urged that the United States would not have the right to erect any structures on the tide land in front of an upland owner, providing such structures would not interfere with the upland owner's right of ingress and egress to and from his premises to the highway. It follows that the only right which the upland owner holds which cannot be taken from him against his will, except by condemnation proceedings, is his easement which provides a passageway from his land to deep water. By what course of reasoning can it be held, therefore, that a private individual maintaining and operating a legitimate industry in front of the upland owner's holdings, which does not conflict or interfere with [672] the latter's access to deep water navigation, should be restrained from operating such industry at the instances of the upland owner when the latter's rights are not infringed by reason of the existence of such industry?

The facts in this case are almost identical with the facts in *Re Columbia Canning Company vs. Hampton, supra*. It is true in that case the plaintiff did not allege that the fish-trap of the defendant was interfering with the former's right of access from

his upland holdings to navigable water, but his complaint did allege that the defendant's fish-trap was constructed on the tide land immediately in front of his upland holdings. But our appellate court held in that case that the complaint was insufficient to state a cause of action. The defect in the case, however, could not have been cured by merely alleging that the plaintiff's access was cut off by the maintenance of defendant's structure, unless the evidence in the case actually proved the truth of such allegation. If plaintiff's contention in this case were tenable, the Court would have held the complaint in the Hampton case sufficient, for in that case the complaint did show that the structure erected by defendant was on the tide land in front of plaintiff's upland holdings. It is apparent from the evidence that the principal object of plaintiff in securing title to the tract of land described in the complaint was to enable him to control the fishing site in front of such upland. It is true, as the plaintiff says, he may be able to use and probably can use such upland for other purposes, but it is apparent from plaintiff's own testimony that his main purpose in securing title to such property was to enable him to hold the frontage for the purpose of erecting a fish-trap and enjoying the sole right to fish by any stationary appliance between his upland and deep water navigation. However the pleadings in this case [673] may differ from the pleadings in the Hampton case, it is obvious that the object of both suits is the same, to wit, to enable the plaintiff to enjoy exclusive fishing rights in front of

his upland holdings.

In *Re Decker vs. Pacific Coast Company*, *supra*, Judge Morrow, after quoting from *Shively vs. Bowlby*, 152 U. S. 1, used the following language:

“This is the general rule and is designed to keep navigable waters free and open to the public for commerce and navigation and at the same time permit the littoral owner and those engaged in commerce and navigation to have access to navigable water, but it cannot be ascertained from the allegations in the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant’s premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated rather than obstructed by the maintenance of a wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau.”

The language quoted is incompatible with the theory of the plaintiff that no structures may be maintained on the tide land in front of the upland owner’s premises against his will. Nor is the holding in the *Decker* case in any manner in conflict with the holding in *Re McCloskey vs. Pacific Coast Company*, *supra*, wherein the Court held that the littoral owner had a right of access to the navigable waters in front of his land and from every part

thereof. It doesn't follow because the littoral owner has a right of access from every point of his land to navigable water that he can insist on proceeding from every point in a course at right angles to his shore line. Nor does the opinion in *Re Dalton vs. Hazelett*, *supra*, in any way conflict with the views herein expressed, for in that case the lower court found as a fact that the structures of the defendant did interfere with the right of access of the littoral owner to navigable water, and the bill of exceptions having been stricken there was nothing for the Appellate Court [674] to consider excepting the allegations of the bill and the findings of the Court, and the complaint alleged and the trial court found as a fact that the structures of the defendant interfered with the plaintiff's right of access from his upland to navigable water.

“The plaintiff had erected an oyster-house in a tidal river opposite the defendant's villa lots. The defendant tore it down before it was used, claiming that it obscured the prospect, obstructed the access and injured the value of his lots. It did not appear that the water-way to the lots had ever been used: Held, that the defendant's action was unjustifiable.”

*Bowden vs. Lewis*, 43 Am. Reports, 21.

In *Re Taylor vs. Commonwealth*, 47 S. E. Rep. 875, at page 881, the Court said:

“In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected and so far as the record discloses there is no purpose to erect any



pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right but her duty as such trustee to render this property productive. Is it reasonable that the commonwealth holding title to the soil is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being the owner of adjoining soil when the rights of each and all can be fully protected without diminution and without hindrance? If the time should come when the river front of the plaintiff shall be divided into lots whose owners find it necessary to their profitable ownership to erect piers and wharves upon them, if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and in the light of changed conditions the Court may be again called upon to consider the respective rights of the riparian owner and those remaining in the commonwealth, or which have been granted to others. The property in dispute was originally leased by the state as an oyster planting ground, but since in the prosecution of that



industry mineral water was discovered far beneath the soil which has proved of great value. There may be other and more valuable substances hidden in the soil. As to that conjecture would be idle. But whatever that soil contains belongs to the State, and the State and it alone has the right to develop its hidden resources of wealth, if such there be, for the common benefit of all its citizens."

In *Re Ferry Pass Inspectors & Shippers' Association vs. White River Inspectors & Shippers' Association*, 22 L. R. A. [675] (N. S.) 345, at page 350, the Court said:

"While the complainant and the defendant in common with all other inhabitants of the State have a right to use the waters of a navigable stream and the lands thereunder, including the shore or space between high and low water mark, for purposes of navigation and the transportation of logs thereover, neither the complainant nor the defendant has such right to the exclusion of its lawful exercise by the other or by any other inhabitant of the State. If the defendant in fact so uses the water or the land thereunder, including the shore, as to deprive the complainant of all access to the river from its lands or to its lands from the river, or to injure the complainant in the use and enjoyment of his riparian land or the business thereon, the defendant may be enjoined from a continuance of such wrong; but the complainant has no exclusive right to use the water or shore for its

business. If the defendant obstructs the mere right of navigation with no special injury to the complainant's riparian property, the remedy is by public officials. The prayer of the bill of complaint appears to contemplate the enforcement of an exclusive right of the complainant to the use of the waters and shore opposite its land for the conduct of its business; and as the complainant has no such exclusive right, the particular and entire relief as prayed should not be granted. There may, however, under the allegations of the bill of complaint be properly granted some relief against the total exclusion of the riparian owner from access to his lands and the demurrer should not have been sustained."

In *Re Barnes et al. vs. Midland R. Terminal Company*, 85 N. E. Rep. 1093, at page 1096, the Court said:

"It is necessary, therefore, to give the condition in the patent its reasonable and obvious meaning, and when that is done it matters but little whether the defendant rests upon its letters patent or upon its legal right as a riparian owner. The result in either case is the same and the peculiar language of the statute is referred to only because the referee in one of his findings emphasizes the fact that the defendant had constructed its pier a year or two before it obtained its letters patent. It is enough to say that either as littoral owner or by virtue of its letters patent the defendant had the right to

construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended, that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the shore the former was paramount and the land was subordinate; and the logical corollary to that proposition is that just in so far as the attempted exercise of the littoral or riparian right passed the prescribed boundaries of necessity and reason, the conditions were reserved and the right of passage along the afore-shore or remained the paramount right. That is so because a littoral or riparian owner in his capacity as such acquires only those rights in the afore-shore which are necessary to enable him to make a reasonable use of his upland; and the principal attribute of such use is access to and egress from the open water. The defendant, therefore, had the right to erect and maintain a pier for the purpose of connecting its upland with the sea just so far as it was a necessary [676] consequence of the reasonable exercise of that right to obstruct the afore-shore and thus to limit the free and convenient passage of the public. The defendant's rights are superior to all others save those reserved to Congress and the state legislature. To the extent that the defendant has transcended these bounds the rights of the public remain unaffected."

In *Re Hedges vs. West Shore R. Company*, 44 N. E. Rep. 691, at page 693 the Court, among other things, said:

“The owner of the banks and shore could not so exercise his right of passage or access to the channel as to destroy or unreasonably interfere with the right of the sovereign to put its own land to such use as it thought proper. Where two such rights or interests exist with respect to the same portion of the earth’s surface each must be exercised and enjoyed in a reasonable way; each right or interest in such a case is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other. \* \* \* The owner of the uplands cannot exercise his easement or right of access to the channel in such a way as to prevent other parties to whom the sovereign has granted the bed of the river or some portion of it from using their own property in a reasonable way. The rights of the parties in these respects are governed by the general rules of law applicable to easements and servitudes generally.”

See, also, an unpublished opinion by this Court in cause No. 398 (*Valdez*), *Low et al. vs. Katalla Company et al.* Counsel for the plaintiff strenuously insist that the holding by this Court in the *Katalla* case, *supra*, is in conflict with a long line of decisions by the Alaskan courts with reference to the rights of the littoral and riparian owner, and cite *Juneau Ferry Company vs. Alaska Steamship Company*, 1 Alaska, 553; *Lewis vs. Johnson*, 1 Alaska, 529; *Car-*



roll vs. Price, 81 Federal, 137; United States vs. Roth, 2 Alaska, 257; Sutter vs. Heckman, 1 Alaska, 81.

In *Re Juneau Ferry Company vs. Alaska Steamship Company*, *supra*, it is true this Court held that the owner of the uplands and shore line has a right to pass out over tide lands to deep water, subject to the rights of navigation and commerce, and while such principal is not in conflict with the views expressed herein yet on appeal in that case, in the opinion reported in 121 Federal, 356, our Appellate Court held that there was no question of riparian ownership involved. The question was as to whether or not the plaintiff had such a possession [677] in the tide land as would enable him to maintain ejectment. In modifying the holding of the lower court, Judge Ross said on page 357, among other things:

“The suit being one in equity we must deny the privilege; and we are of the opinion that while the evidence undoubtedly shows that the complainant and its predecessors in interest used the strip of waterfront in controversy from time to time, yet it falls far short of establishing such possession thereof on the part of the complainant as would justify the injunction prayed for. It is still clearer that there was no evidence of any ownership of the premises in question by the defendant to the suit and, therefore, that portion of the decree adjudging defendant the owner thereof is erroneous. The appropriate decree in view of the evidence is one to the effect that the complainant take nothing by its suit and dis-



missing the bill at complainant's costs."

The lower court apparently took the view that the defendant by reason of being the upland owner enjoyed the right to the possession of all the tide land in front of him, but the Appellate Court refused to concur in that doctrine.

In the case of *Lewis vs. Johnson, supra*, if the opinion recites all of the facts pleaded, it is clearly in conflict with the holding of our Appellate Court in *Columbia Canning Co. vs. Hampton and Decker vs. Pacific Coast Company, supra*.

In *Re Carroll vs. Price, supra*, the littoral rights of riparian owners are not discussed, but the case deals with possessory rights on tide land.

With reference to the case of the *United States vs. Roth, supra*, I think it will be conceded that the doctrine announced in that case was clearly overruled by the two cases last cited. In that case the Court held that the upland owner had constructive possession of all of the tide lands in front of his holdings, and, therefore, that one who erected a tent on such tide land was guilty of criminal trespass. However, under the holdings of our Appellate Court it seems unnecessary at this time to cite any authorities to show that the upland owner has no possessory rights whatever in the tide lands in front of him.

In *Re Sutter v. Heckman, supra*, the trial court held that [678] the owner of the upland by virtue of his riparian and littoral rights acquired the possession to a certain piece of tide land in front of him by virtue of such littoral and riparian rights. On appeal our Appellate Court, while affirming the de-

cision of the lower court, refused to adopt the theory of the lower court, but affirmed the case on the ground that the plaintiff and his predecessors in interest were in the possession of the tide lands in controversy on May 17, 1884, and had held continuous possession of the same until the commencement of the suit, and for that reason such possession was protected by section 8 of an act providing a civil government for Alaska and for other purposes, approved May 17, 1884, 23 Stat. L. 24. It is true the Appellate Court quoted at length from the opinion of the trial court, not for the purpose of approving the principles of law announced therein, but as a means of ascertaining the facts therein recited, and in commenting on such quotation from the opinion of the trial court, Judge Ross said, on page 88:

“We are of the opinion that the decree may and should be affirmed without reference to the theory upon which the Court below proceeded.”

And on motion for rehearing, in 128 Federal, 393, the Appellate Court reaffirmed its former ruling and based the affirmance of the decree on the ground of continuous possession from May 17, 1884, until the time of the commencement of the action; thus holding that the act of May 17, 1884, which protected Indians and other persons in their possession of lands until future legislation by Congress should enable them to acquire title thereto, protects such persons in possession of tide lands as well as these in possession of uplands.

After a careful and critical review, therefore, of the opinions of this Court, regarding the question of

littoral rights, it is reasonably obvious that where in conflict with the holding in the Katalla case they have been overruled by [679] the cases of the Columbia Canning Company vs. Hampton and Decker vs. Pacific Coast Company, *supra*.

In *Re Coburn vs. Ames*, 52 California, 385, at page 398, the Court said:

“Assuming as we do for the purposes of this decision that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is nevertheless entitled to the possession of the land below high-water mark on the theory that at some future time he may possibly change his mind and desire to erect a wharf. On this theory he might capriciously refuse to erect a wharf at a point where all the convenience of commerce demand it and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this: that if he desires to wharf out and is unlawfully obstructed in the exercise of the right, he may maintain an action for damages and, if the obstruction amounts to a public nuisance, it may be abated by appropriate proceedings for the purpose. If

it only be a private nuisance which obstructs him in the exercise of his right to wharf out, he may possibly cause it to be abated by the appropriated method. But he has no such title or right to the possession of the bed of the ocean as will enable him to maintain ejectment.

“In this state there are numerous large land estates held in private ownership which front for many miles on the shore of the ocean and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless in virtue merely of his riparian rights might maintain ejectment for all such structures erected by others, which when recovered he might either demolish or cease to use in aid of commerce, it is not difficult to foresee the disastrous consequences which would result from such a doctrine.”

If the doctrine contended for by the plaintiff in this case were adopted as the law in the District of Alaska a few individuals could secure title to all upland abutting on all the waters containing all the available trap-sites within the District of Alaska and thereafter enjoy a perpetual right to erect fish-traps immediately in front of such upland, and if any other person should attempt to erect such a structure, could stay such attempt by injunctive proceedings although [680] such structures or traps may not in any way prevent the upland owner from reaching



navigable water. The language last quoted from the California case portrays clearly the evil results which would follow were the plaintiff's contention with reference to the rights of littoral and riparian owners upheld in this jurisdiction.

The upland owner unquestionably has a right to wharf out from his premises, as is held by our appellate court in *Dalton v. Hazelett*, *supra*, but he merely enjoys that right for the purpose of improving or providing an access to navigable water; but in case he has no desire or no reason for erecting a wharf or pier why should the law permit him to interfere with another who desires to maintain a legitimate and productive industry in front of his upland, particularly when the same does not in any manner interfere with a reasonable right of access which he enjoys by virtue of being the owner of the lands abutting on navigable water?

Assuming, therefore, in accordance with the views herein expressed that the upland owner merely enjoys under the law a reasonable right of access from his upland to navigable water, the second question involved, to wit: Whether the defendant's fish-trap interferes with such right? will next be considered. The evidence shows that all of the structure is below low-water mark and, while there is considerable conflict with reference to the feasibility of the plaintiff's being able to reach all points of his upland from deep water, a careful review, however, of the testimony will disclose the fact that for any purpose to which the land of the plaintiff can be appropriated, under his testimony, he will have no difficulty whatever in



reaching such premises from the navigable waters of Chatham Straits. If he desires to build a wharf, such wharf can be built under the testimony from either the west or the [681] east side of the premises. But there is no testimony which warrants the Court in assuming that the plaintiff needs or will construct a wharf to such premises at this time, unless he can by injunction compel the defendant to remove his fish-trap so that plaintiff may erect one in its place and stead. The plaintiff admits in his testimony that he desired to build a fish-trap in about the same place as the defendant has erected his, and that if the defendant's fish-trap were not in existence he would probably construct one in the same place. Such fish-trap if constructed by plaintiff would evidently interfere with his right of access to his upland to the same extent that the defendant's structure obstructs such access. Since the hearing of this trial, however, the Judge of this court in company with counsel for both the plaintiff and the defendant has had an opportunity to visit the situs of the fish-trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed so that, instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits.

For the reasons herein assigned this action should be dismissed. Let findings of fact, conclusions of law and decree be entered in accordance with this opinion.

Given in open court at Juneau, Alaska, this 4th day of May, 1912.

THOMAS R. LYONS,  
Judge. [682]

[Endorsed]: Form No. 680. No. 840-A. In the District Court of the United States for the Div. No. 1, of Alaska. James T. Barron vs. Claire J. Alexander. Opinion. Filed May 4, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [683]

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*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,  
  
Plaintiff,  
  
vs.

CLAIRE J. ALEXANDER,  
  
Defendant.

**Certificate and Order Settling Bill of Exceptions.**

The above and foregoing Bill of Exceptions hereto attached was presented to me on this 2d day of July, A. D. 1912, in the time allowed by the order and rules of this Court; and the same having been examined by me, and by the Court:

NOW, THEREFORE, I, THOMAS R. LYONS, the Judge before whom said cause was tried, do hereby settle and allow the same as a full, true and

correct Bill of Exceptions herein, and do order the same filed as and made a part of the record herein; and I do further certify that said Bill of Exceptions contains a full, true and correct transcript of all the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits and on which the same was heard.

Done in open court this 2d day of July, A. D. 1912.

THOMAS R. LYONS,

Judge.

[Endorsed]: No. 840-A. In the District Court for the District of Alaska, Division No. 1. J. T. Barron vs. Claire Alexander. Bill of Exceptions. Filed Jul. 2, 1912. E. W. Pettit, Clerk. By \_\_\_\_\_, Deputy. [684]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Stipulation [for Transmission of Original Exhibits.]**

IT IS HEREBY STIPULATED AND AGREED by and between counsel representing the above-named plaintiff and the above-named defendant, respectively, that the following original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California,

as a part of the plaintiff's Bill of Exceptions, viz.:

Plaintiff's Exhibits marked "A," "B," "D" and "E" (also marked "C").

Defendant's Exhibits marked 5, 6, 7, 8, 9, 10, 11, 12, 3 and 4.

Dated July 24th, 1912.

WINN & BURTON,  
Attorneys for Plaintiff.

Z. R. CHENEY,  
Attorneys for Defendant.

Filed Jul. 24, 1912. E. W. Pettit, Clerk. By  
\_\_\_\_\_, Deputy. [685]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Order [Directing Transmission of Original Exhibits].**

Stipulation signed by counsel representing the above-named plaintiff and the above-named defendant, respectively, agreeing that plaintiff's original exhibits marked "A," "B," "D" and "E," and defendant's original exhibits numbered 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, be sent to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, as a part of plaintiff's bill of exceptions; and the

Court being fully advised in the premises,—

IT IS ORDERED, that the plaintiff's original exhibits "A," "B," "D" and "E," and defendant's original exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 be forwarded as part of plaintiff's Bill of Exceptions to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 24 day of July, A. D. 1912.

CORNELIUS D. MURANE,

Judge.

O. K.—Z. R. CHENEY,

Atty. for Defendant.

Entered Court Journal, No. 1, page 334.

Filed Jul. 24, 1912. E. W. Pettit, Clerk. By  
———, Deputy. [686]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

**Stipulation [Omitting Form of Application of Soldiers' Additional Homestead from Transcript of Record, etc].**

It is hereby stipulated and agreed by and between counsel representing plaintiff and defendant, respectively, in the above-entitled cause, that that certain form of Application of Soldiers' Additional



Homestead mentioned and referred to in the order of above-entitled court dated July 2d, 1912, not having been offered in evidence in the above-entitled cause and not being an exhibit therein and no part of the record on appeal herein, be omitted from the Transcript of the Record on Appeal;

It is further stipulated and agreed that Defendant's Exhibit No. 13, being a letter from Thlinket Packing Company, by James Barron, President, dated March 14, 1911, be made a part of the Record on Appeal.

Dated August 1st, 1912.

WINN & BURTON,  
Attorneys for Plaintiff.

Z. R. CHENEY,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 1, 1912. E. W. Pettit,  
Clerk. By ———, Deputy. [687]

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**[Plaintiff's Exhibit "C."]**

Barron vs. Alexander—Plff's Ex. "C"—Rec'd in  
Ev.—R. E. R.

For proof of claim, see application of Andrew Wigeby, of Shelby, Montana, assignee of Richard J. Whitten, filed at Great Falls, Mont., for SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 31, T. 32 N. R. 1 E., M. M., 40 acres.

United States Land Office,

Juneau, Alaska.

Serial No. 01472

Filed Aug. 30, 1911. M.

Receipt No. 4675

C. B. Walker, Register.

**Assignment by Assignee.**

Whereas, Richard J. Whitten, who made original homestead entry of the N.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 18 T. 1

S. R. 20 W. Arkansas, of which the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  was canceled Aug. 12/72 for conflict, at Washington, Arkansas, on Jan. 22, 1868, and is entitled to enter 120 acres additional public land under the provisions of sections 2306 and 2307 R. S., U. S., has executed proof papers, and assigned such right of entry to the undersigned, by an assignment in writing, dated June 27, 1908, and the undersigned has sold 80 acres of such right of entry to James T. Barron,

FOR VALUE RECEIVED, I, Anna Dunne, assignee of the original beneficiary, Richard J. Whitten, do hereby sell, assign and transfer unto the said James T. Barron and his heirs and assigns forever, 80 acres of the said right of entry, and authorize the said James T. Barron, his heirs and assigns, to make such entry of public land and receive patent therefor.

I further state, under oath, that I purchased said right for a valuable consideration and that I have made no other sale or use of the same and that I was the *bona fide* owner of said right when this assignment was made. [688]

Signed, sealed and delivered this 3d day of Dec., 1909.

ANNA DUNNE. (Seal)

Witnesses:

(1) JAMES DEERING.

(2) TED E. COLLINS.

State of Montana,

County of Lewis & Clark,—ss.

On this 3d day of Dec., 1909, before me personally came Anna Dunne, to me well known as the person

who executed the foregoing assignment, and acknowledged the foregoing assignment to be her act and deed for the purposes therein named; and being duly sworn, says the foregoing statements are true.

[James Deering—Notarial Seal, State of Montana.]

JAMES DEERING,

Notary Public for the State of Montana, Residing at  
Helena, Montana.

My commission expires April 19, 1912. [689]

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**[Plaintiff's Exhibit "D."]**

Barron vs. Alexander—Plffs. Ex. "D"—R. E. R.  
Form 125-1908

SIGNAL CORPS, UNITED STATES ARMY.  
TELEGRAM.

Received at

No. 11 Si. SC. CH. Wk. 23

P. Portland Ogn Mch. 28-1911.

Fred Barker,

Juneau, Alaska.

Commence construction of wharf from upland survey Eight hundred four out into navigable water chatham straits. Operate piledriver number two use cables freely.

JAS. T. BARRON.

10 am. [690]

**[Plaintiff's Exhibit "E."]**

Barron vs. Alexander—Plffs. Ex. "E"—R. E. R.  
Form 125-1908

**SIGNAL CORPS, UNITED STATES ARMY.**

20

Telegram.

Received at

31SI. B. CH. N. 34. Paid.

P. Portland, Ore., Mch. 28, 1911.

Fred Barker,

Juneau, Alaska.

Subject to courts decision prepare pile driver number two assemble piling for wharf fronting survey eight hundred four. Mailing plan of wharf if necessary will go north immediately remaining short time awaiting news answer.

**JAMES T. BARRON.**

3:02 P. [691]

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**[Defendant's Exhibit No. 1.]**

**POSTAL-TELEGRAPH COMMERCIAL  
CABLES.**

Clarence H. Mackay, President.

**TELEGRAM.**

No.

Received at

Main Office, 126 Third Street.

Portland, Oregon.

Main 435

Telephones: Home A-1435

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to

the terms and conditions printed on the back of this blank.

16.P      DESIGN PATENT No. 40529

---

D 8452

E 5694

378

120 Z    BT      55 Collect via Seattle Wn.

Juneau Alaska Mar 27 1911.

Telephoned to J. T. Barron

H. E.

8 15 P

J. T. Barron

Wells Fargo Blg

Portland Org

Burton asks that you wire fully that it is your intention at once to build and construct wharf from Upland embraced survey 804 Alaska out and into deep and navigable waters chatham straits for access from said Upland to and into navigable waters and that you are sending affidavit to this effect.

FRED BARKER.      8 08 P. M.

Alexander vs. Barron—Defts. Ex. 1—R. E. R.

[692]



## [Defendant's Exhibit No. 2.]

POSTAL TELEGRAPH—COMMERCIAL  
CABLES

## POSTAL TELEGRAPH

## COMMERCIAL CABLES

Clarence H. Mackay, President.

## CABLEGRAM.

Registered Trade-Mark. Design Patent No. 36369.

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

No.	Time	Check	Route Via
		Paid	

Chg. Thlinket Pkg. Co.

Send the following Cablegram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

Portland, Ore. Mar. 28, 1911.

To Newark L. Burton, Atty. at Law,  
Juneau, Alaska.

It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

JAS. T. BARRON.

Alexander vs. Barron—Defts. Ex. 2—R. E. R.

The Sender will please read the conditions on back

and sign name and address thereon for reference. The Postal Company's system reaches all important points in the United States and British America, and via Commercial Cables, all the world. [693]

B Barron v. Alexander—Defts. Ex. 2—R. E. R.

**THLINKET PACKING COMPANY.**

Cannery at Funter Bay, Alaska.	Salmon Brands:
JAS. T. BARRON, Pres. & Mgr.	"Searose," High Grade Red Alaska.
M. G. MUNLY, Secretary.	"Tepee," Standard Medium Red.
C. T. WHITNEY, Mgr. Sales Dept.	"Buster," "Peasant," "Thlinket."
	Best Grade Pink.
	"Arctic Belle," Best Grade Chum.
	WE GUARANTEE OUR BRANDS.

Main Office

**WELLS FARGO & CO. BUILDING.**

**PORTLAND, ORE.**

2d Trial—Barron vs. Alexander—Defts. Ex. (13)—  
Recd. in Ev. R. E. R.

Funter, Alaska, March 14th, 1911.

To The Tee Harbor Packing Co.,

Its Agent, or To Whom It May Concern,

You are notified herewith, that, in event of your jumping any of our trap locations, you do so at your own peril. We intend to drive and fish all our locations this season, and will protect our rights at all hazards.

**THLINKET PACKING CO.**

By JAS. T. BARRON—President.

B. [694]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff and Appellant,

vs.

CLAIRE J. ALEXANDER,

Defendant and Appellee.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached six hundred and ninety-four pages of typewritten and other matter, numbered from one to six hundred ninety-four, both numbers inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the appellant, filed herein and made a part hereof, in cause No. 840-A, entitled James T. Barron, Plaintiff and Appellant, vs. Claire J. Alexander, Defendant and Appellee.

I do further certify that the said record is by virtue of order allowing appeal and the citation issued herein and made a part hereof, and the return in accordance therewith.

I do further certify that the said record has been prepared by me in my office, and the costs of preparation, examination, and certificate amounting to Three Hundred Thirteen 40/100 (\$313.40) Dollars has been

paid to me by Messrs. Winn and Burton, attorneys for the plaintiff and appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court, this 3d day of August, 1912.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,  
Div. No. 1.

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[Endorsed]: No. 2171. United States Circuit Court of Appeals for the Ninth Circuit. James T. Barron, Appellant, vs. Claire J. Alexander, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Received August 10, 1912.

F. D. MONCKTON,

Clerk.

Filed August 15, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.





IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JAMES T. BARRON,

*Appellant,*

*vs.*

CLAIRE J. ALEXANDER,

*Appellee.*

No. 2171.

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Upon Appeal from the United States District  
Court for the District of Alaska,  
Division No. 1

AMENDED AND SUPPLEMENTAL  
BRIEF OF APPELLANT

---

JNO. R. WINN and  
N. L. BURTON,  
*Attorneys for Appellant.*



**In the**  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JAMES T. BARRON,

*Appellant,*

*vs.*

CLAIRE J. ALEXANDER,

*Appellee.*

No. 2171.

---

Upon Appeal from the United States District Court for  
the District of Alaska, Division No. 1

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**Amended and Supplemental Brief of Appellant**

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**STATEMENT OF CASE.**

This is an appeal prosecuted by the above named appellant and plaintiff, James T. Barron, from an order made by the trial court herein, on the second day of July, 1912, overruling appellant's motion for a new trial and a decree entered herein on the same date, dismissing appellant's complaint herein (P. R. pp. 52-54).

We believe the following to be a full, true and complete statement of the case, to-wit:

That on October 31st, 1908, one V. A. Robertson entered upon, and had surveyed, a portion of United States government land, unoccupied and unappropriated, and located, under the Soldiers' Additional Homestead Laws applicable to Alaska and pertaining to the acquisition of title to government land in said District of Alaska, that certain piece or parcel of land known as U. S. Non-Mineral Survey No. 804, lying and being on the south shore of Chatham Strait, a navigable arm of the North Pacific Ocean about five miles north of what is known as Hawk Inlet, in said district, which said U. S. Non-Mineral Survey No. 804 contained a water frontage on Chatham Strait of about 800 feet (P. R. p. 152).

On the 16th day of June, 1909, the official plat and field notes of said land and survey were approved by the surveyor general of the District of Alaska, and said plat and field notes, so approved, were, as in such cases made and provided, forwarded by the surveyor general to the local U. S. land office at Juneau, Alaska.

On the first day of March, 1911, for a valuable consideration, said Robertson conveyed, by a good and sufficient deed in writing, the above described tract or parcel of land, to James T. Barron, the ap-

pellant herein. On August 25th, 1911, Barron made application to the local land office at Juneau, Alaska, for a patent to the lands embraced in said survey (P. R. p. 93). Said application for a patent was prosecuted with diligence, and all the necessary steps taken looking towards the obtaining of a final receiver's certificate and all proofs submitted pertaining thereto, before the trial of this cause (P. R. pp. 101, 102), and the court found that, at the time of the trial of said cause, the said Barron was the owner and entitled to the possession of all of the tract of land embraced in said U. S. Non-Mineral Survey 804 (P. R. p. 49).

At the time of the purchase of said tract of land, by said Barron from said Robertson, the said Barron was, and had been for a long time prior thereto, largely interested in a corporation known as the Thlinket Packing Company, owning and operating a large salmon cannery at Funter Bay, Alaska, a distance of about four miles from the land embraced in said U. S. Survey No. 804; said salmon cannery was a large one and had the capacity of about 3,000 cases of salmon per day; Chatham Straits, the arm of the Pacific Ocean upon which the land in said Survey 804 borders or abuts, contains



navigable waters for all sizes of vessels, and in all parts of said straits the ocean tides regularly ebb and flow, and the waters of said straits abound in fish, and especially salmon, and particularly in that part of the waters of said straits immediately in front of and upon which said land and said survey abuts, making said piece of ground specially valuable as a fishing site, when the way to it, over the waters of said Chatham Straits, is unobstructed, and ingress and egress to and from said land to the deep water of said straits is unobstructed in any manner; on account of the winds and tides and the elements, the said tract of land is particularly and favorably located upon a small harbor, affording good anchorage for vessels and protection from the severe north and northwest winds which blow at certain seasons of the year in that locality. The particular location of said piece of ground, and the small harbor in front thereof, and the cannery site of the Thlinket Packing Company, in which said Barron is heavily interested, is indicated on the plat and map found at page 187, vol. 1 of the record. Also see Barron's testimony, page 189, in connection therewith.

Prior to the year 1910, the Alaska Packers' Association, a corporation engaged in the salmon

packing in Alaska, had used the waters in front of the tract of land in said Survey 804, for the purpose of running and operating a fish trap, and said Barron, by reason of operating the cannery of the Thlinket Packing Company, had become acquainted with this fish trap location, and the value of the harbor in front of said survey for the anchoring of vessels, and accordingly, in the year 1910, leased from the Alaska Packers' Association this fish trap site, afterwards purchased same (P. R. p. 202). After he had leased said trap site, he found that the said V. A. Robertson owned, or claimed to own, the land abutting thereon, and embraced in said Survey 804. For said reason, said Barron knew it would be impracticable to fish said location, without interfering with Robertson's water front privileges and tide lands and uplands. Barron then, and during the year 1910, drove three piles into the water or upon the tide lands in front of the said survey, and posted thereon a notice that he claimed this said location for a fish trap site, and immediately began to look up Robertson, the owner of the upland, in order to purchase the same from him, so as to perfect his right to the fish trap site and make it feasible and practicable to operate the fish trap thereon. However, Barron did not succeed in purchasing said

upland until the first day of March, 1911 (P. R. p. 202). Barron acquired all of the Alaska Packers' Association interest in and to said fish trap location, and the lands embraced in U. S. Survey 804, from Robertson, for the purpose to be used as a fishing site, and any and all purposes that the same could be used for in connection with the packing of salmon at the Funter Bay cannery, in which said Barron was heavily interested, and was general manager.

In the operation and carrying on of said salmon packing business at Funter Bay, it is necessary, in order to supply said cannery with salmon, to bring them from a distance in tow-boats, gasoline boats and barges. It is also necessary to have, each season, a great many timbers, in the way of piling, for the purpose of constructing fish traps and other purposes, and it is necessary to tow such piles or piling from quite a distance, most of the same being obtained from in and about Hawk's Inlet, which said last mentioned body of water is reached by Barron's tow-boats leaving Funter Bay cannery, passing down the straits and immediately in front of the land embraced in said U. S. Survey 804, and the harbor in front thereof. At the time of such towing of piles, there prevails in that locality high northern and northwesterly winds, and for several years last

past Barron and the Thlinket Packing Company, for which he was acting, had used the harbor in front of the said survey for refuge and shelter from such prevailing northerly winds. Alexander, the appellee herein, was acquainted with this fishing trap site in question, and the upland, prior to the year 1910, while the Alaska Packers' Association was fishing said trap site, and in fact constructed or assisted in the construction of the Alaska Packers' Association's fish trap upon this location.

On or about the 14th day of March, 1911, the above named appellee and his servants and employes entered upon the tide lands and the water in front of said Survey No. 804, and entered upon the navigable waters directly in front of said described land, without the knowledge or consent of this plaintiff, and commenced to drive piles upon the tide lands and waters immediately in front of and abutting upon the said land contained in said survey, at the points and places indicated on plaintiff's exhibit found at page 36 of the printed record.

Immediately upon Alexander commencing the driving of the piles last above mentioned, the facts became known to this appellant, and Mr. Barker, the superintendent of said Thlinket Packing Company's

cannery, forbade the said Alexander and his agent from driving said piles and obstructing appellant's right-of-way out to deep water (P. R. p. 316), and all of appellant's rights were made known to said Alexander at said time, and the same two or three piles that had been driven by Barron a year before were still upon the ground with the notice thereon heretofore referred to (P. R. pp. 316-7). Notwithstanding said notification and fact, the appellee, Alexander, continued driving said piles. On the 22nd day of March, 1911, and while appellee was driving the piles above mentioned, the appellant herein filed his complaint in the District Court of Alaska, Division No. 1, praying that a temporary restraining order be granted, restraining the defendant or appellee, *et cetera*, from building or erecting said fish trap in and upon said tide lands and navigable waters in front of said land embraced in said Survey 804, or in anywise interfering with plaintiff's right of possession or use of said tide lands, or in obstructing plaintiff's or appellant's right-of-way out from his land to the navigable waters of said Chatham Straits (P. R. p. 9). Upon the filing of said complaint and application of Barron, a temporary restraining order was granted pending an order to show cause, which said order to show cause



was returnable the 30th day of March, 1911. At said time a hearing was had thereon and oral testimony and other evidence submitted to the court, and resulted in the court making an order dissolving the temporary restraining order (P. R. p. 24). At the time of said hearing the fish trap of Alexander had been constructed in the manner that is indicated upon plaintiff's exhibit ..... (P. R. p. 36). Upon said hearing, Alexander testified that his fish trap was complete in so far as the lead was concerned, but needed some seven or eight more piles to complete some other parts of the fish trap (P. R. p. 514). Immediately after the dissolution of said temporary restraining order, Alexander proceeded to the completion of his trap, and also extending the lead of said trap in towards the upland of Barron, a distance of 261 feet (P. R. p. 514). This action of Alexander was prompted by being advised by his counsel that he, Alexander, was as much the owner of the upland contained in U. S. Survey 804 as Barron, and had as good a right to the same as Barron had. The changes thus made by Alexander in the extension of the lead of his trap led to the filing of the amended and supplemental complaint herein, upon which said supplemental complaint, answer thereto, and reply, this case was tried.

After all the evidence was introduced on the part of both parties, and either just before or after argument of counsel, Judge Thomas R. Lyons, the trial judge, announced, of his own accord, and without any request of the plaintiff (appellant), and in the presence of the attorneys representing both parties, that he, the said judge of said court, expected to file a written opinion in the said cause, but before doing so would visit the fish trap site and upland set out and referred to in the complaint in this cause; that some time after the trial of the cause and before the judge of the said court filed his written opinion herein, he visited the said premises, and when arrived there, the defendant was upon the ground with several men, pile driver and gasoline boat, and had destroyed the evidence of and manner in which the fish trap described and set out in the amended and supplemental complaint herein was constructed, and was engaged in constructing another fish trap, immediately in front of the shore land and upland contained in U. S. Survey No. 804 (P. R. pp. 718, 742). After the visit to the premises, the court did accordingly file his written opinion herein, from which it appears that the court took into consideration the changed condition of the fish trap, and the change that had been made in its structure after the

close of the evidence, in arriving at his decision.

He states as follows:

“That such alteration in the construction of said fish trap eliminated any possible question, in his judgment, of its interfering with plaintiff’s right of access from every point of his upland to the navigable waters of Chatham Straits” (P. R. p. 742).

Within the time required by law, and after the closing of the evidence and argument of counsel, appellant, by his attorneys, offered and presented to the court his proposed findings of fact and conclusions of law, which are set forth in full at pages 701-710 of the record, which said findings and conclusions the court refused to sign and allow, to which refusal plaintiff excepted, and an exception was allowed.

Immediately after the judge filed his written opinion herein, appellant filed a motion for a new trial and for the setting aside of said opinion or decision, which said motion is set forth in full at pages 710-714, inclusive, of the record, which said motion sets forth the statutory grounds, and particularly asks a rehearing upon the grounds that the court erred in visiting and viewing the premises or situs of the fish trap, and the upland referred to in the complaint, and had taken into consideration in

rendering his decision the changed and altered condition of the fish trap, and had been influenced by such new evidence in the rendition of his opinion or decision, and such proceedings by the court was an abuse of discretion and an irregularity and surprise to plaintiff which materially affected his substantial rights, and which ordinary prudence could not have guarded against. Thereafter the court made its findings of fact and conclusions of law, which are set forth at pages 49 to 51, inclusive, of the record.

Thereafter and on, to-wit, the second day of July, 1912, and after the findings of fact and conclusions of law had been made, signed and filed by the trial judge, and within the time required by law, plaintiff filed another motion for a new trial or rehearing and the setting aside of the findings of fact thus made by the court, which said motion appears in P. R. pp. 715 to 717, inclusive. This motion also contains the statutory grounds of a motion for a new trial, as well as calling the court's attention to irregularity in the trial, in the court being influenced by the changed condition of the trap and the condition it was in upon the day in which he visited the same, not being the same one complained of and set forth in the pleadings concerning which the trial was had, accident and surprise materially af-

feeting the substantial rights of appellant, *et cetera*. Both of these motions were denied by written orders of the court, and the appellant allowed exception to the ruling of the court upon each of said motions (P. R. pp. 45, 52).

The order denying motion for a new trial, on page 52 of the record, reads as follows:

“The motion for new trial herein, or the setting aside of the findings of fact and conclusions of law made and filed by the court in this cause, and the granting of a rehearing herein, coming on for hearing on motion of plaintiff, and the same being supported by the affidavit of Jno. R. Winn herein concerning the visit of the Judge of this court to the situs of the fish trap and the tract of land described in plaintiff’s complaint and the change made in the construction of said fish trap, and the court being fully advised in the premises, overrules and denies said motion and further states that the change made in the construction of the fish trap by the said defendant does not cause the same to in anywise interfere with plaintiff’s free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof, or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits. To all of which the plaintiff asks and is allowed an exception.”

After overruling the motion for a new trial or rehearing herein, the court proceeded to render its decision dismissing plaintiff’s or appellant’s cause of action (P. R. pp. 53-54).



## SPECIFICATION OF ERROR RELIED UPON.

Numerous errors are assigned and relied upon for the reversal of the opinion, decree and decision of the court herein, which are as follows, to-wit:

## I.

The court erred in making an order herein on March 30, 1911, dissolving the temporary restraining order which had heretofore been sued out and obtained in this court and cause.

## II.

The court erred in not making, signing and filing herein findings of fact 1 offered and tendered by the plaintiff, which said finding covered substantially the fact that the plaintiff was for several years prior to the commencement of this action, and was at the time of the commencement thereof, the president of the Tklinket Packing Company, and was largely interested in said company, and which said company was the owner of a large number of floating stock, fish boats, etc., and fish trap sites and fishing stations, which were all necessary for the conducting of its said business.

## III.

The court also erred in not making, signing and filing herein finding of fact II offered and tendered by plaintiff, which said finding established the fact that the plaintiff herein purchased the trap site in controversy from the Alaska Packers' Association, a corporation, long prior to the defendant claiming any interest therein.

## IV.

The court erred in not making finding of fact III offered and tendered by the plaintiff herein, which said finding establishes the fact of the taking up by one V. A. Robertson, his soldier's additional homestead claim, which abutted upon the fish-trap site location in controversy, and which said taking up was made a long time prior to defendant claiming any interest in the waters or shore land immediately in front of said homestead claim, which is designated as U. S. Non-mineral Survey No. 804, containing 5.27 acres.

## V.

The court erred in not making finding of fact IV offered and tendered by the plaintiff herein, which recites the fact of the purchase by the plain-

tiff from the above mentioned V. A. Robertson, of the upland contained in his said soldier's additional homestead claim known as U. S. Non-mineral Survey No. 804, which said purchase was made by said plaintiff before the defendant ever claimed any right, title or interest in and to the shore land bordering thereon or the water front of said upland, and that plaintiff continued patent proceedings for said Survey No. 804 which had theretofore been commenced by said Robertson; and that plaintiff obtained a final receiver's certificate therefor before the trial of this cause.

That all of said findings I, II, III and IV, so offered and tendered by plaintiff, were supported by all the evidence in said cause.

## VI.

The court erred in refusing to make finding of fact V offered and tendered by the plaintiff herein, which said finding recites the fact that plaintiff, by reason of owning the upland contained in Survey No. 804 is entitled to the exclusive right of ingress and egress between his upland and from the shore land, etc., to navigable waters of Chatham Straits abutting thereon, and is entitled to the exclusive and unobstructed access to said waters from all points of his upland.

## VII.

The court erred in refusing to make finding of fact VI, offered and tendered by plaintiff, which in substance shows the use to which plaintiff had devoted the waters and harbor in front of his upland before defendant claimed any right to said waters, or right to build and maintain a fish trap therein, and further showing the necessity of plaintiff having the use of said waters for mooring of vessels and reaching of upland butting thereon; all of which said above mentioned facts were established in part by uncontradicted testimony and evidence, and the remaining portion by a great preponderance of the evidence in said cause.

## VIII.

The court erred in refusing to make finding of fact VII offered and tendered by the plaintiff herein, which said finding established the fact of the entry of the plaintiff herein, on March 14, 1911, upon the shore land and water immediately in front of said Survey No. 804, and placing therein and thereupon several piles and a notice that he claimed the said ground and waters as a fish-trap site and station, and the wrongful entry thereon upon said premises thereafter by said defendant and doing the

acts complained of in said finding so offered and tendered; also show the false representations made and testified to by the defendant in order to get the temporary restraining order granted herein dissolved; also showing the manner in which said defendant constructed his fish trap, and extending of the lead thereof to the upland of plaintiff; for the reason and upon the ground that all of said facts so contained in said finding were either supported by the uncontradicted testimony and evidence or a great preponderance of the evidence in said cause.

## IX.

The court erred in not making finding of fact VIII offered and tendered by plaintiff herein, wherein said court was asked to find, among other things, that the construction and maintenance of said fish trap by defendant had obstructed plaintiff's access to the navigable waters abutting upon his upland, and in fact had, to a great extent, cut off plaintiff's egress from his upland to said navigable waters abutting thereon, and particularly had it done so at the point or place that plaintiff had been accustomed to anchor and moor his vessels, and cut off plaintiff's access to said navigable waters from the part of his shore land best adapted for



said purpose and which had been so selected by plaintiff a long time prior to defendant initiating any rights to said shore lands or water immediately in front thereof, for the reason that the said facts set forth in said finding were either supported by the uncontradicted evidence or a great preponderance of the evidence in said cause.

The court erred in not making conclusions of law I, II and III, offered and tendered by plaintiff for the reason that said conclusions are supported in some respects by uncontradicted evidence in said cause, and in all respects by a great preponderance of the evidence.

The court erred in making, signing and filing all of that portion of the court's finding of fact II herein, which reads as follows:

“That the said fish trap, and the whole thereof, including the lead line, are situate in the waters of Catham Straits and below low water mark,”

for the reason that said portion of said finding is unsupported by the evidence and largely against the uncontradicted evidence and entirely contrary to a great preponderance of the evidence in said cause.

That the court erred in making its finding of fact III, which is as follows:

“That defendant’s fish trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his lands, as hereinbefore described, to the navigable waters of said Chatham Straits,”

for the reason that same, in many respects, is against the uncontradicted evidence in said cause, and in all respects against the great preponderance of the evidence and admitted facts in said cause.

The court erred in making conclusions of law I and II herein, for the reason said conclusions are against law and are unsupported by the evidence.

The court erred in visiting and inspecting the fish trap site and waters and shore land in and upon which said fish trap was constructed, and the upland described in the complaint, after the close of the evidence in said cause, for the reason and upon the ground that said visit was made by the court, or judge thereof, upon his own motion and after all

the evidence and argument of counsel had been made in the cause, and for the further reason that it appears conclusively from the record in said case that upon the court's arrival at the property in question, the very thing which he desired to see had been removed, or destroyed, and a new and different fish trap and lead constructed; and these matters were all taken into consideration by the court in the making of its findings of fact herein, and influenced the court in the rendition of the final judgment herein, and is tantamount to depriving plaintiff of his property or property rights without a trial and the rendering of a decision by the court, not upon the cause of action set forth in the complaint, but the substitution by the court of a new and entirely different cause of action and rendering a judgment and decree upon the same upon his own judgment and without evidence, and without the plaintiff having his day in court; and the court should have considered the action of the defendant herein as a confession that the way the fish trap set up in the complaint was constructed, it obstructed and cut off plaintiff's free ingress to his upland from the navigable waters bordering thereon, and egress from such upland to said waters.

The court erred in not granting the motion for a new trial or rehearing herein and setting aside his written opinion filed in this cause.

The court erred in overruling and denying plaintiff's motion herein to set aside the findings of fact and conclusions of law made and rendered by the court, and granting a rehearing or new trial in this cause.

The foregoing errors assigned will be considered in this brief under the five following heads:

1st. The court below erred in not finding that the appellant had a paramount right to the use and occupancy of all of the shore lands or tide lands and waters in front of his upland, and a superior right to said fish-trap locations, as against the appellee, irrespective of the ordinary doctrine that a party who owns uplands bordering upon navigable waters is entitled to free and unobstructed access from all points of his upland to such navigable waters.

2nd. The court below erred in making its finding number three, found at pages 50-51 of the printed record, which reads as follows:

“That defendant's fish trap does not in any manner interfere with the free ingress and

egress to and from the premises hereinbefore described to the deep waters of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits."

3rd. The court below erred in holding that, under the evidence in the case, the appellant had reasonable access to the navigable waters of Chatham Straits, and in further holding that, as against the rights of the appellee, appellant is only entitled to reasonable access from his upland to the deep waters of said straits.

4th. The court below erred in visiting and viewing the premises in controversy, or the situs of the fish trap, after the close of the case, for the following reasons: (1) For the reason that the judge did so of his own free will and accord, and not at the request or solicitation of either of the parties to the action, after there had been a change in the structure or fish trap complained of in the amended and



supplemental complaint; (2) for the reason that the court misused and misapplied the information or knowledge thus gained, to the prejudice of and in a way or manner that materially affected the substantial rights of appellant.

5th. The court below erred in not granting the plaintiff below a new trial or rehearing upon the showing made.

## ARGUMENT.

We will take up the several propositions of law and questions of fact and present them to this honorable court in the order last mentioned.

## I.

*The court below erred in not finding that the appellant had a paramount right to the use and occupancy of all of the shore lands or tide lands and waters in front of his upland, and a superior right to said fish-trap locations, as against any right of the appellee, irrespective of the ordinary doctrine that a party who own uplands bordering upon navigable waters is entitled to free and unobstructed access from the same to such navigable waters.*

The fact that V. A. Robertson did, between October 31st and November 1st, 1908, have the upland mentioned and set forth in the amended and supplemental complaint duly and regularly surveyed under the Soldiers' Additional Homestead Law pertaining to the District of Alaska, is undisputed (see plat, p. 88, P. R). And, also, that the said V. A. Robertson did thereafter, on the 8th day of March, 1911, by a good and sufficient deed, convey to Barron, the appellant, the upland described in said

amended and supplemental complaint and designated as U. S. Non-mineral Survey 804, is undisputed (P. R. pp. 142-143). Mr. Barker, however, testifies that the deal for this property, as between Robertson and Barron, was closed on the first day of March, but the deed not made out until the 8th (P. R. p. 314). The further fact is undisputed that said Barron, the appellant, immediately after the purchase of this land from Robertson, diligently proceeded in the United States land office to obtain a patent, and, at the time of the trial, had furnished all necessary proof to obtain patent (P. R. pp. 101-102); and the court has found that the appellant was, at the time of the trial of the case, the owner of the premises and land contained in said U. S. Non-mineral Survey 804 (P. R. pp. 50-51). The fact that the Alaska Packers' Association, a corporation, had fished the fish-trap location in controversy, prior to 1910, is also an admitted fact in the case (P. R. p. 517). Further, it is uncontroverted that Barron purchased whatever rights the Alaska Packers' Association may have had in and to said fish-trap location, and, in 1910, drove some piles upon the location in question, and placed a notice thereon claiming the site as a fish-trap location (P. R. p. 316), and this notice and piles were still

upon the ground when the defendant Alexander, in 1911, invaded the premises and location in controversy. Alexander was also notified that Barron intended to fish this location the year of 1911.

The land department held, in the case of *Northwestern Fisheries Company*, 39 L. D. 598, that an approved survey for a Soldiers' Additional Homestead location constitutes, in advance of the filing of application in the local land office, "a legal appropriation under the public land laws," and it confers "legal rights" within the meaning of those words, within the proclamation creating the forest reserve. In a later case decided by the secretary of the interior, it has been held that, when a party enters upon public lands subject to appropriation by the exercise of the rights conferred under the Soldiers' Additional Homestead Scrip Act, and commences a survey thereof, and prosecutes his proceedings to a patent with diligence, the homesteader's rights relate back to the time of commencing the survey. In other words, simply the commencing of the survey segregates the land sought to be patented from the public domain, providing patent proceedings are prosecuted with diligence. This case we have not at hand, but will present it to the court on the oral argument. However, in the case before

the court, the survey, field notes, plats, and so forth, had all been passed upon and approved by the surveyor general of Alaska before the appellee attempted to initiate any right to the fish-trap location in question; and this brings appellant's case directly within the doctrine laid down in 39 L. D. This being true, Barron's rights in and to his upland and right-of-way to deep water dates back either to October 31st, 1908, the time of the commencement of the survey by Robertson, or June 16th, 1906, the date of the approval of the same by the surveyor general of the District of Alaska.

On June 26th, 1906, congress passed "An act for the protection and regulation of the fisheries of Alaska" (Act of June 26, 1906, ch. 3547; 34 Stat. L. 478; p. 22, Federal Statutes Annotated, Supplement of 1909). The fourth section of said act provides, among other things, "It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance." This statute was not called



to the attention of this honorable court in the case of *Columbia Canning Company vs. Hampton*, 161 Fed. 60. We contend that congress, by the passage of the act in question, recognized the right of parties to fish in Alaskan waters by means of fish traps, and so forth, and furnished a protection to anyone who has commenced the construction of a fish trap or initiated a right to a fishing trap location, and the force and effect of the statute or act in question is tantamount to granting the privilege of building and constructing fish traps in the waters of Alaska, and that any person who has initiated the right to a fish-trap location or commenced the construction of a fish trap, if prior in time, will be prior in right. The appellant in the case before the court was prior in time, by reason of having purchased the location in question from the A. P. A. Co. and driven some piles and placed a notice thereon, and for these reasons, we contend, that, leaving out the question of an upland owner being entitled to free access to navigable waters bordering upon his land, Barron in this case has a prior right to the fish-trap location as against Alexander, the appellee.

## II.

*The court below erred in making its finding number three, found at pages 50 to 51 of the printed record, which reads as follows:*

*“That defendant’s fish trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits.”*

We take the position that the above finding of the court is absolutely against the great preponderance if not the uncontradicted evidence and testimony in the case, and, to prove this to this honorable court, we have to take the laboring oar. Hence, it will be necessary for us, in order to plainly and concisely present our view of the case in this respect, to quote considerable of the testimony of the various witnesses who testified, and think that we will be

able to show to the court, beyond any peradventure or controversy, that we are right, not only from the testimony and evidence of all of the witnesses who testified in the case concerning the matters set forth in said finding of fact of the court, but by the admission of the appellee himself, when the case was called for trial.

John W. Dudley, formerly register of the United States Land Office at Juneau, Alaska, was called as a witness on behalf of plaintiff (P. R. 120 to 140).

This last-named witness testified, among other things, that he had been upon the upland embraced within said Survey No. 804, and had observed the fish trap constructed in front of said upland and that it was all in front of said upland, that the plat marked Exhibit "D," being plaintiff's exhibit, appears to show the trap as it was located and about the position it occupied on the ground (P. R. 132-133).

On page 133 is the following question and answer, namely:

"Q. Now, I will ask you, Mr. Dudley, when you were out there (upland) at this time if you noticed as to whether or not the lead from the pot and fillers (spillers) and heart of the trap that was

being fished upon the ground extended out to high-tide mark, low-tide mark, or the upland, and how far it did extend?

A. When I was upon the ground the piles did not extend up to low-water mark. I should judge it was about half tide when I was there, if I remember right, and there was some distance of water between the piling and the shore, but there was a cable stretched up to where, I should imagine, was the high-water mark, and that was supported by a cross or shear, leading over this and anchored to some point apparently on the upland."

Lloyd G. Hill, a witness on behalf of plaintiff, testified at said trial that he was a witness at the preliminary hearing of this cause when a temporary restraining order issued herein was dissolved; that prior to being called as such witness at such preliminary hearing he had been upon the ground embraced in U. S. Non-Mineral Survey No. 804; that at said preliminary hearing he identified plat marked Exhibit "C"; that he prepared said plat from an actual survey upon the ground (said plat is marked Exhibit "C" and "E", "C" being the exhibit letter at the preliminary hearing and "E" the exhibit letter on the trial). (See P. R. 145 and also plat on following page.)

This witness further testified that he determined the corners of the claim and located the position of nearly all the piles, and that the piles

extending towards the shore and nearest to the shore were determined accurately (P. R. 146).

That he made an actual survey of the fish trap by means of a transit, chain and tape line (P. R. 149).

On page 149 of the record it appears that this witness went on the ground and obtained the data contained in the plat marked Exhibit "E" on the 28th day of March, 1911, and on the following page of the record he states that at that time the number of piles driven in said trap was forty-three; that at said time the lead of said trap extended to a point marked on said plat "ebb tide," and that at said time the entire length of said fish trap was about two hundred and fifty feet (P. R. 151; plats referred to herein are on pages 147 and 164 of the record and were marked Exhibits "E" and "D", respectively, on the trial of this cause).

On pages 151 and 152 the position of the objects marked on said plat as bare rock and reef he located by traverse, and that the entire length of said fish trap on March 28, 1911, or at the time of the preliminary hearing, was two hundred and fifty feet.

It further appears from Mr. Hill's testimony on pages 152 and 153 of the record that at said



time, viz., on March, 28, 1911, and at the time of the preliminary hearing, that a straight line drawn from the westerly boundary line of said Survey 804 into the waters of Chatham Straits would bring the nearest pile of said trap to said line so prolonged within a distance of about two hundred feet; that a prolongation of the easterly line of said survey out into the waters of Chatham Straits would bring the nearest pile of said fish trap to said line so prolonged within a distance of about four hundred and sixty feet. That the entire water front of said Survey 804 by a straight line is 788.7 feet, and the meander line of said survey along the water front approximately 800 feet (P. R. 152 and 153).

On pages 153 and 154, the witness testifies to soundings made by him in the waters of Chatham Straits in front of said Survey 804 on March 28, 1911, or just prior to the time of a preliminary hearing in this cause, and states that at said time there was 21 feet at the northwest end of the trap, and up to the line of the lead, as the lead existed at that time, continued 16 feet.

“BY THE COURT: That means ebb tide.

A. Yes, sir. (P. R. 154.)

Q. Sixteen feet at the end of the lead as it was then constructed?

A. Yes, sir.

Q. Now, then, did you make any examination at that time to find out the condition, Mr. Hill, of the ground that was covered with the water and as to whether or not there were boulders there or anything of that kind?

A. Yes, sir, I can say, yes, sir. Of course, pretty hard to tell anything below the surface of the water, but ground between low water and high water was very rocky, large boulders, three or four feet high." (P. R. 154.)

This witness further testified that he again visited the premises about a year later, namely, on March 10th or 11th, 1912, which was a few days before the trial of this cause, and with reference to the changed condition of the fish trap, etc., states as follows:

"Q. This year?

A. Yes, sir.

Q. Did you make any other observations as to the fish trap that was then standing upon the ground and also make other soundings or anything of that kind?

A. I did; yes, sir; I made other soundings there.

Q. Who was with you?

A. Well, there was Captain Mason and the deckhand on the 'Anna Barron,' named Steve, I don't know his last name; Mr. Barron, and Mr. Barron's two pilers—I think two piledriver men.

Q. Now, I will hand you Mr. Hill, Plaintiff's Exhibit 'D' for identification, which Mr. Dudley testified concerning, and ask you who drew this exhibit?

A. I drew this map.

Q. How did you get the data from which you drew the map, Mr. Hill?

A. Well, I had the notes from the former survey and what additional notes I wanted to take I made them from actual survey upon the ground.

Q. Who, if any one, aided you in making the soundings at that time?

A. Why, Steve, the deckhand on the 'Anna Barron,' and two pilers and myself the last time, and the first time Captain Mason and Mr. Barron. We were all present in the boat.

Q. Now, this map and plat which you have, marked 'D' for identification, is just the same so far as the data thereon placed as is on Plaintiff's Exhibit 'E,' that is, so far as they are extended on Exhibit 'E'?

A. Yes, sir; I think so.

Q. Then, you made some additional measurements and—how, Mr. Hill, did you find the structure that you had seen upon this ground, called the fish trap, on your previous trip, with respect to the one you found when you made this trip last week?

A. Well, the first time I was there the fish trap was more or less incomplete.

Q. Yes.

A. The pot and the spiller and the heart—those things they were not nearly as uniform as they are now, and the lead line as it extended from the near-

est end at that time toward the shore a distance of 261 feet.

Q. How many more piles are there in that lead than was there at the time that you testified upon the hearing of the motion to dissolve the temporary restraining order?

A. How many more—there is 14 piles, has been—15, I think.

Q. Yes.

A. One is out.

Q. And where they have been driven with respect to the end of the lead that you found, as you have testified to, and as it is marked on Exhibit 'E'—where were they driven with respect—

A. They had been driven on the line of the lead as it then existed in a northeasterly direction toward the shore.

Q. Then it extended 261 feet in further toward the shore than it did when you were out there on that other trip?

A. Yes, sir.

Q. And how many piles did you say had been put there?

A. Fifteen."

On page 158 of the record, this witness testified that he made soundings from the east corner of the fish trap over to the bare rocky point (shown on plat Exhibit "D"), and from that point ran back a line of soundings toward the pile nearest in-shore of the fish lead. From that pile a range of sound-

ings were made on a line through to what is known as U. S. Non-Mineral Monument No. 804, simply as fixing the position of the soundings. All these soundings were taken at low water on March 11, 1912, and are marked on Exhibit "D". That witness found the depth of water at the pile nearest the shore to be eight feet; that the stage of the tide would be low water at 1:50 in the afternoon and soundings were commenced at 12:30 and completed about one o'clock. That the June tides would be lower probably by six feet (600 feet in record incorrect) than the March tides; that at the lowest tide the depth of water where the last pile in said lead, or the pile nearest the shore, the water would not be more than two feet deep (P. R. 158-159).

This witness further states that the ground abutting the water front of this claim is a steep, rocky bluff on the easterly portion, with the exception of a very little corner at the extreme east, which is rather good ground; that on the westerly end at low tide the area between low and high tide is covered by large boulders and rock, but at extreme high tide there is quite a gravelly beach on the westerly side (P. R. 159-160).

Further testifying, the witness states that a prolongation of the lead line would intersect the



shore line at a point 172 feet from the east corner of the claim; that this 172 feet is very rough ground and the banks quite bluff and steep. That a prolongation of a line from the westerly boundary of said upland out into deep water to the nearest pile of the fish trap would leave a space on the westerly end of said claim of about 100 feet (P. R. 162); that this end of the upland is covered by large boulders.

It also appears from this witness' testimony that at the time of the preliminary hearing, by a prolongation of a line extending from the most westerly pile of the trap to intersect the upland left a space on the westerly end of said survey 804 of about 200 feet. So that between the time of the preliminary hearing and the trial of this cause such change had been made in said trap as to reduce the space, by a prolongation of the westerly end line to intersect the trap as aforesaid, to 100 feet.

Further testifying, the witness states that on March 11, 1912, the distance from the pot and spiller and the lower end of the trap to the object marked on the plat "reef" was 365 feet (P. R. 162-163); and the same distance from the object marked on the plat as rocky point (P. R. 162-163).

That the reef and rocky point were bare, and there was a passageway between the reef and the bare rock, and witness could hardly go through such passageway with a row boat, etc.

That the soundings shown on exhibit marked "D" are correct (P. R. 164).

That the entire length of the trap on March 11, 1912, was 520 feet, as against 250 feet at the time of the preliminary hearing.

Upon cross-examination this witness testified that he fixed the line at low tide at three or four different points, namely, at the prolongation of the east boundary of the claim, the prolongation of the west boundary to mean low water and at the point marked 250 feet on the plat from the shore into the lead (P. R. 170).

James T. Barron, the plaintiff in this case, testified as a witness in his own behalf:

That he is the president and the principal stockholder of the Thlinket Packing Company; that said company has a cannery at Funter Bay, Alaska; that Funter Bay appears on chart marked Exhibit "B," and is the place where said cannery of the Thlinket Packing Company is located; that Funter

Bay is distant from survey No. 804 about five miles (P. R. 187 and 189).

That the said cannery at Funtier Bay has a capacity of 3,000 cases of salmon per day; that fish traps are used by said company to catch salmon for the purpose of supplying the cannery with fish (P. R. 191).

That the principal part of the piles used in the construction of the company's traps are obtained down Chatham Straits, Peril Straits and Freshwater Bay; that they go down near the ground embraced in Survey 804 for said piles; that in 1911 they used 1,100 piles for fish trap purposes; that all of said piles were brought from a point south of the ground contained in Survey 804, except some on the beach; that they used a tow-boat for the purpose of towing piles, and that the "Anna Barron" and the "Buster," two boats belonging to plaintiff's company, are used for the purpose of towing piles for said Thlinket Packing Company (P. R. 194).

Plaintiff further testified that he first became acquainted with Survey 804 several years ago when Captain Crockett was captain of the boat; that said Crockett used to run in there in a north wind for anchorage (P. R. 195).

Witness testified that he purchased any and all claims which the Alaska Packers' Association had in fish-trap locations in front of said survey about the time he purchased the upland, or rights of V. A. Robertson in the upland; that prior to said time he had a lease to said fish-trap location from the Alaska Packers' Association; that at the time he leased the fish-trap location, which was in 1910, he intended to use the upland as a fishing site, but found the same had been taken up by Victor Robertson, and so on March the 8th, 1911, obtained a deed from Robertson for said upland embraced in said Survey No. 804 (P. R. 202).

“Q. Prior to this time did you know as to whether or not this was a place for anchorage and harbor also?

A. Oh, yes.

Q. Then, did you cause anything to be done in regard to indicating your claim to this property before you went below in 1910?

A. Well, I gave orders to drive piling there, which I did in the spring of 1910, also to hold the ground and gave notice that I claimed the right of a fishing site there, like it has been the custom.” (P. R. 203).

Witness further testified that he put up a notice with his name and that it was a trap location (P. R. 203).

This witness corroborated the testimony of Hill and Dudley with reference to the web running from the lead of the trap being fastened to the shore, etc. (P. R. 206).

Also, that the harbor in front of said upland is protected against north winds, etc. (P. R. 217).

“Q. Now, Mr. Barron, I will ask you from your experience \* \* \* with these cannery steamers \* \* \* suppose this man Alexander (the defendant) had only constructed his trap with the pots and spillers, etc., as they are indicated upon this Exhibit ‘E’ and extended his lead up to where he had it when the temporary restraining order in this case was dissolved, being the little cluster of piles just opposite the words on this plat ‘Barron’s Piles,’ now cut off—I will ask you as to whether or not a structure of this kind would obstruct the entrance of steamers the size of the ‘Anna Barron,’ ‘Georgia’ or other steamers that may go in there, from the entrance to this harbor and the upland?”

A. It would be quite dangerous to go through there at times, especially when the tide or the winds were blowing. \* \* \*” (P. R. 217-218).

This witness testified that with a fish trap in front of the upland embraced in Survey 804 it would be impossible to go in there with the “Anna Barron” and anchor with a raft, etc., even as the trap was constructed at the time of the preliminary hearing (P. R. 219).

This witness also testifies that he visited said



survey with Mr. Hill when soundings were made by Hill; that he saw the soundings made at the last pile nearest the shore and the depth at that time was eight feet; that this was an hour before low tide.

“Q. I did ask you if there was any chance, Mr. Barron, even though there was no web ever been strung between that last pile and the upland, for any size of gasoline boat, or any other boat, to navigate between the upland and that pile at ordinary low tide?

A. No; a small gasoline boat could go there. Three big boulders there, probably three or four feet long, high; they entirely close up along in between, entirely; along the shore line you might get a depth of, say, four or five feet and get on top of a boulder and you'd have three or four or five feet less of water (P. R. 222).

Q. I understand when you was out there at ordinary low tide that was entirely closed up from that pile on up to the ordinary line of high tide.

A. Yes.

Q. No chance of getting through there unless you ran through his trap?

A. No.” (P. R. 222).

Witness states that the “Anna Barron” is 90 feet in length and draws  $8\frac{1}{2}$  feet of water (P. R. 225); that the only place for landing boats, etc., in front of said survey is about opposite the cabin near the westerly side line of said survey (P. R. 223).

“Q. There is about three hundred or four hundred feet near the westerly end line?

A. Northwest corner.

Q. Yes; of your claim, and that will be a place for landing, and so forth?

A. Yes.” (P. R. 223).

Witness further testified that if he desired to wharf out, that this trap, as constructed by Alexander, would prevent his so doing.

“Q. Now, I will ask you, Mr. Barron, what is it that makes this ground in and about this trap and between the trap and the peninsula marked ‘bare rock’—what makes that better anchorage ground than this out to the eastward of that?

A. Because you are closer to the lea shore. (P. R. 260-261.)

Q. Now, Mr. Barron, you testified, I believe, in answer to a question of Mr. Jennings’, about how far you would have to anchor out from the upland of this Survey 804 in case that you would go in there with a steamer like the ‘Anna Barron’ and with a tow of logs? I don’t know whether you answered that clearly or not.

A. You couldn’t go there at all; impossible the way the trap is completed, completely cuts you out of the harbor. (P. R. 263.)

Q. Indicate—how is that, Mr. Barron?

A. The course of the trap is right across the harbor there. \* \* \*” (P. R. 263.)

Fred Barker, a witness on behalf of plaintiff, testified: That he is the superintendent of the

Thlinket Packing Company and that the plaintiff closed the deal with Mr. Robertson to purchase the latter's rights in the upland embraced in Survey 804 on the first day of March, 1911 (P. R. 314).

That he is acquainted with the defendant; saw him on March 14 (1911) on a pile driver at the fish-trap location in front of Survey 804 (P. R. 315).

That on said date at said place had a conversation with the defendant, and the defendant asked witness if certain location piles were Mr. Barron's piles, and witness stated they were and that there was a notice nailed upon the pile, and the defendant answered that he would respect that but expected to be enjoined and would fight it out in court (P. R. 317-318).

That he was a witness upon the preliminary hearing; saw the fish trap prior to the preliminary hearing, and that the defendant had since said hearing driven about forty-three piles (P. R. 319); that defendant Alexander testified upon the preliminary hearing that his trap was completed and that he would drive no more piles inshore from the lead as it was then (P. R. 329). The witness saw the fish trap again on April 7, 1911, and there were nearly eighty piles in the trap altogether, and the trap was

260 feet longer in toward the shore. That he was present when Mr. Hill made the soundings on March 11, 1912, and the figures shown on the plat marked Exhibit "D" are correct (P. R. 335). That the most practicable and best place to build a wharf is from a point in front of the cabin on the upland and that to build such wharf from said point would intersect the fish trap of defendant (P. R. 337).

T. H. Mason, a witness on behalf of plaintiff, was called and testified:

That he was a master mariner, and had followed the sea most of his life; that he is well acquainted with the waters of Alaska; that he had been running on the inside passage to Alaska for the last twenty-five years as master of a vessel (P. R. 347).

That he had been all over the waters of Southeastern Alaska, and knows Funtier Bay and the Funtier Bay cannery, etc. That he is at present master of the "Anna Barron," a steamship engaged in the fishing business, towing trap piles, lighters, etc., and is one of the cannery tenders of the Thlinket Packing Company; that he has been master of the "Anna Barron" for three years, and during that time said "Anna Barron" has been

engaged in towing fish, lighters, piledriver and piles (P. R. 348-349).

That south of Funter Bay towing has been confined to Kelp Bay and Peril Straits. That he knows Survey 804; that the cove or little harbor in front of said survey is a good harbor against northerly winds and northwesterly winds; coming to the northward it is an excellent harbor.

That he has had occasion to go into said harbor with a tow of piles from Kelp Bay (P. R. 351); that this harbor is much nearer to the cannery than Hawk Inlet and more convenient to go in there when on the way to the cannery, etc. (P. R. 351).

This witness corroborates Hill and Barker with reference to the fish trap as constructed in March, 1911 (P. R. 355); that he was present at the preliminary hearing and heard the defendant testify.

This witness was asked a question as to whether or not the defendant testified at said preliminary hearing that his trap was completed; objection was taken and allowed, to which plaintiff excepted (P. R. 359).

This witness fully corroborates the testimony of the other witnesses on behalf of plaintiff with reference to the changed condition of the lead of



said fish trap between the date of the preliminary hearing and this final hearing (P. R. 350); also that the defendant had his line or wire fixed to the last pile and a shear on the beach and the web was attached to the wire and hung down to the water (P. R. 361).

Witness also assisted in making the soundings and fully corroborates Mr. Hill and Mr. Barker (P. R. 362).

“Q. Now Captain, I will ask you if you have ever had any experience in leading in there—in making soundings on the right hand side of the lead of the trap as you come into Barron’s claim 804?

A. I have paid particular attention to the subject out to 600—from 500 to 600 yards north from this trap to the eastward, and I sound the bottom and I know, if I have any judgment, that it was—that the lead would strike, it was rocky and the nearer I approached the trap from the east the less rocks I had to contend with (P. R. 363).”

Witness further testified that the bottom, to the east of the trap, so far as his judgment is concerned, “provided you are to anchor or to drive piles, this I don’t think you can drive in the ground \* \* \* because the bottom there is rocky and there is a shelf of rock making off, right off here \* \* \* making off from the upland in a westward direction at right angles to this plat”; that in taking a

steamship into this harbor he would anchor between what is called the bare rock and the row of Barron piles, provided the fish trap was not there (P. R. 364-365).

This witness corroborates the testimony given by the witnesses that would be impossible to go into this harbor with a tow of logs without running into the fish trap (P. R. 365).

This witness fully corroborates Hill's testimony concerning the tides, etc., (P. R. 372).

BY THE COURT: "Now Captain, I would like you to tell me all the reasons you know against the feasibility of the construction of a wharf from the end—from the easterly end of this survey out to deep water?"

A. Well, simply, Your Honor, just as I stated before. You have an abrupt bluff that makes up high, it shelves down as far as I've seen below water, nothing but rocks to the low water mark. Now, what is beyond that we have found hard bottom, and I don't know whether is rocks or not. Sometimes you can put a pile on and drive it, it will go down a foot and strike hard bottom and then you can get it no further; but this place here which I've just represented, that is certainly an abrupt bluff, and it is almost impossible at high water to walk past this place unless you get up on the timber land.

Q. Now, I have asked you, Captain, to state all the reason—I want all the reasons without putting any suggestions to you against the feasibility of the construction of a wharf at any point beyond the

lead line of the defendant and the prolongation of the easterly end line of plaintiff's?

A. I think I have stated my reasons for not building a wharf there.

\* \* \* \* \*

Q. And those are the only reasons you know of against the feasibility of a wharf at that place?

A. Well, it is not—a wharf built there wouldn't be as secure there for safety as one here.

\* \* \* \* \*

MR. WINN: The Court wants all the reasons.

A. For the first place, there is a good tide here and in the second place, I think, with a southwest wind we have the longer reach to draw, and here maybe 500 feet from this place the wind does not have the effect that it would here." (P. R. 410-411).

\* \* \* \* \*

The witness being further questioned by the court testified that it would cost a good deal more to put a wharf from the point indicated by the court and further, that he doesn't think a wharf could be constructed, *with any safety*, from the bluff out to the westward; that it is impracticable; also, in answer to a question by the court, the witness testified that the place indicated by the court would not be a good place to build a wharf for the further reason the more "you get this way" the

more you have to contend with the wind from the northwest and west. (P. R. 413).

Cap. Thornton testified on behalf of plaintiff:

That he has followed steamboating for nearly twenty-five years; has served in every capacity up to captain; that he is at the present time master of the steamship "Georgia", (a passenger and freight steamer) running between Juneau and Skagway and Juneau and Sitka, Alaska; that he knows Funter Bay, also the little harbor or cove in front of Survey 804 (P. R. 416-417).

That he has known said harbor for a good many years; that he has noticed the winds as they blow up and down this shore (Chatham Straits), especially the northeast wind; that the stiffest breezes between Hawk Inlet and Funter Bay is beyond the little bight (harbor in front of Survey 804) to the northward of it (P. R. 419).

That he has seen the fish trap of defendant as constructed at the time of this hearing or trial; that the manner in which it was constructed, with a cable strung from the last pile nearest the shore and attached to something beyond the line of ordinary high tide, or say, between the line of ordinary high tide and the low tide would, in the

estimation of the witness, close the ingress and egress to and from the upland embraced in survey 804 (P. R. 420-421).

Corroborates witnesses concerning the wind, etc. (P. R. 423).

“Q. Now Captain, from what you saw and know of this little cove out there in front of Barron's property would it, in your judgment, be possible to maintain a wharf in there so that you could have ingress and egress to and from that wharf to the upland of Barron with this fish trap there constructed the way it is?

A. No, sir; I certainly wouldn't take a vessel inside of that fish trap.” (P. R. 432).

Testifies that if the depth of water at pile of trap nearest the shore was eight feet on March 11 (1912) that at extreme tides there that would be about seven feet plus these soundings less; that would make it less than one foot depth of water at extreme low tide at nearest pile to shore (P. R. 434-435).

Charles Carlson called as a witness on behalf of plaintiff, testified:

That he is pilot on the steamship “Georgia”; that he has seen the fish trap of defendant in front of survey 804, and that the same obstructs the entrance to the upland embraced in said survey (P. R. 438-439).



C. J. Alexander was called by plaintiff as a witness and statement made by counsel that he was, of course, an adverse witness, being the defendant in the case (P. R. 448).

“Q. Didn’t you testify, Mr. Alexander, on the motion for a dissolution of the temporary restraining order, that the most feasible and practicable place, or substantially to that extent, to land on this upland was along this sandy beach just where I have indicated? (near the words “mean and high”)? (P. R. 449).

A. Well, I wouldn’t commit myself, Mr. Winn. I wouldn’t deny that, this question, for the reason that the preliminary hearing was a year ago and I was on the stand for three or four hours and was asked a great many questions. The lawyers put in that testimony and my mind is not clear on all the things. I wouldn’t deny it. (P. R. 451).

Q. Well, now, didn’t you testify upon that hearing for the dissolution of that temporary restraining order when the following question was put to you in this manner, didn’t you answer it as follows: “Q. On both sides of this little bay, it is rocky?” You answered: “Very rocky formation; yes, sir.” Now, did you answer that question that way?

A. I think possibly I may have; yes, sir.” (P. R. 452).

Witness testified that he completed the trap as near as he remembered, a few days after the dissolution of the restraining order (P. R. 457).

That he extended the lead towards the shore 200 feet or more after the dissolution of said re-

straining order (P. R. 459).

“Q. Now, Mr. Alexander, you know upon the hearing to dissolve the restraining order that the question that was being tried then was as to whether or not your structure as you had it then built obstructed the free ingress or egress in and to the property of Barron from the deep water or not. You know that was the question that was being tried?

A. Yes, sir. (P. R. 462).

Q. Now, then, you at that time only had the portion of your fish trap constructed that is indicated on this Exhibit “D” that extends from what is marked upon here “Barron’s Piles” down to this word along here “Alexander’s Piles”—that is the only length of the trap that you had constructed at that time, wasn’t it?

A. Yes, sir. (P. R. 462).

Q. Now, then, since that time you had the piles put in that are indicated in black lines here that extend out toward the shore, didn’t you?

A. Yes, sir. (P. R. 463).

Q. Now, then, isn’t it a fact, Mr. Alexander, that you testified on that application that the reason why your trap as it was then constructed didn’t interfere with boats going in and turning around and coming out up to Barron’s property was because that lead was some where 250 or 300 feet from the shore line.

A. Well, I don’t remember that question asked, Mr. Winn, as it was put to me. I do remember a question that was asked me regarding the opening in there. I testified that. I do remember, that I could not drive the piles in any further.” (P. R. 463).

Witness testified that the trap is obstructing the access and egress to that portion of the claim covering the front of it (P. R. 467).

Also that he may have testified at the preliminary hearing that the trap as then constructed didn't interfere with the ingress and egress to and from the upland belonging to the plaintiff because the end of the lead was some 500 or 600 feet from the shore (P. R. 468).

Witness being asked the question as to what portion of the upland his fish trap obstructs the ingress and egress to and from the navigable waters of Chatham Straits, stated as follows:

"I would say that the trap obstructs that portion of the claim or the access or egress to that portion of the claim which the trap covers, taking a right angle from the meander line of this claim out on either side of the trap. With that line you would have 200 feet or 400 feet or 600 feet, I would say the trap obstructs that much of the frontage." (P. R. 471).

Q. Well, now, isn't it a fact that the most natural place and feasible place for landing on Barron's property is along on that beach just within that distance which you have just now described?"

Witness answered the foregoing question by saying that it would not. (P. R. 472).

"Q. Now, let me ask you, Mr. Alexander, if the following question wasn't put to you on the exami-

nation on the hearing for a dissolution of that temporary injunction and you answered it as follows? "Well, isn't your trap constructed in a sort of cove? A. Yes, right in a sort of cove. Q. Now, isn't that the most natural place for the landing of boats in that cove? A. Yes." (P. R. 472).

Witness admitted he had so testified on the preliminary hearing of this cause (P. R. 472).

Witness admits that since the driving of the additional piles on the lead of said trap towards the shore that he does not contend that a boat the size of the "Georgia" would be able to go in there and circle around (P. R. 507).

The witness on direct examination was propounded the following questions by Mr. Winn:

"Q. I ask you if it is not a fact that you said awhile ago to Mr. Cheney that the reason why you continued this lead out the distance you say you did after the hearing on preliminary injunction was that you followed the advice of your attorneys in this respect?

A. That is what inspired me to try to continue it; yes, sir.

Q. And they advised you that Mr. Barron did not own that upland and that you had just as much right even to drive clear onto the upland as Barron had?

A. That was the substance of their advice; yes, sir.

Q. Now you did testify on that hearing, [hearing to dissolve preliminary injunction], however,

did you not, Mr. Alexander, that it was impossible for you to drive any more piles out in that direction along that lead line?

A. That I believe, yes, sir; I testified to that as my opinion at that time.

Q. Then you did think at that time that your trap was complete, didn't you?

A. Yes, sir.

Q. And you testified that your trap was then complete, didn't you?

A. No, I don't believe I did; that it was complete, with the exception of a portion outside, Mr. Winn.

Q. Yes, complete with the exception of those eight piles you were going to put in?

A. Yes, I think so." (P. R. 504-505).

Q. Do you know how many feet, Mr. Alexander, that you continued the driving of those piles that is indicated on this map, Exhibit 'B', from the piles, 'Barron's Piles', out to the end of the piles; have you ever measured that?

A. I don't think that I ever measured that additional distance that was covered there.

Q. Well, now, Mr. Hill measured it and the testimony here is that it is 231 feet. Do you want the court to understand that that is not correct?

A. No, I don't dispute that measurement." (P. R. 506-507).

On page 485 of the record it will appear that the following questions were propounded to the witness Alexander by Mr. Winn, concerning what



the witness testified on the hearing to dissolve the temporary restraining order:

“Q. Now, then, I will ask you if the following questions were not put to you by Mr. Burton and you answered them as follows: ‘Q. I will ask the question whether it will prevent our free ingress and egress from the shore lands and from the tide lands at this point?’

A Why, I mean it will not in no way. Q. Now, explain to the court why it will not. A Because my trap is out in navigable water; because there is plenty of room inside to operate vessels without interfering with the trap in any wise?’

A. I think I thoroughly understand the question. It was pointing to free access in and around the near end of this lead at that time that way; yes, I answered that question, that I did.”

The defendant called as witness to testify on his behalf J. G. Rowe and J. H. Magill, but they in no way contradict any of the material testimony in this case.

H. P. N. Birkinbine was also called as a witness for the defendant. This witness' testimony consists chiefly of fixing the distance between the reef and the fish trap; the depth of the water at low tide, and of some soundings which he claims to have made. He does not contradict Hill's testimony with reference to the correctness of plat marked Exhibit “D” so far as the same shows the position of the

fish trap with relation to the upland.

Numerous questions were asked this witness in order to ascertain how he obtained the figures of 4.9 feet as being low tide in front of the upland at Chatham Straits and finally admitted that he made no soundings on the east side of the trap at all; that his instructions were confined to the west side, and he practically limited his investigation to the west side; that he does not know how the shore line runs from the said easterly line of Survey 804 (P. R. 625).

In concluding this statement of facts, we would like to call the court's attention to the plat or map following page 35 of Volume 1 of the Printed Record. This map and plat shows, among other things, the fish trap of Alexander as it was at the commencement of the action, and at the time of the hearing on the order to show cause and which was, according to the evidence in the case, completed, as Alexander contended at that time, with the exception of eight piles which were to be put in on the outside of the pot or spiller. Then, following page 146 of the same volume of the record, is a colored map or plat which was offered in evidence by plaintiff showing practically the same as the other plat above mentioned except in colors. Then, following page 163

of the same volume, is the plat which Mr. Hill testifies largely concerning, and is referred to as plaintiff's Exhibit "B", showing measurements, distances and Survey No. 804 and having a great deal of data thereon and particularly showing the additional piles put in the lead of the trap after the hearing on the motion to dissolve the temporary restraining order. The additional piles that were driven by Alexander after the hearing on said motion are marked in black, and show that the lead was extended 261 feet after the order was made dissolving the temporary restraining order. Immediately following page 548 of Volume 3 of the record will be found the defendant Alexander's exhibit which was made by his witness, Mr. Birkinbine. The data contained thereon and the testimony of Mr. Birkinbine, as well as that of Mr. Hill, plaintiff's surveyor, does not show that there is any material difference in the map and plat made by Mr. Hill for Barron and this map made by Birkinbine for Alexander. In fact Mr. Birkinbine does not contradict Mr. Hill upon any material fact in the case, the two witnesses representing opposing parties, but their testimony in all respects materially the same.

It will be observed that there is practically no

dispute with reference to the position which the fish trap in controversy occupies and with reference to the upland contained in Survey 804. On each of the plats made by the surveyors representing the respective parties it will appear that the fish trap is in front of said upland. From the plat marked Exhibit "B", and the testimony of Mr. Hill, and which is undisputed, it is very clear that out of 800 feet frontage of said Survey 804, this trap directly takes up, between the navigable waters of Chatham Straits and the upland, a total of about 522 feet, leaving a space of 172 feet on the easterly end of said upland which is probably not directly obstructed. But the evidence shows that this easterly end is covered by large boulders and rocks between the area of low and high tide and exposed to wind and waves and that the character and condition of the upland is of such a nature that it is not feasible or practicable to make this an outlet from the upland to the deep waters of the Straits. And it also appears from the testimony that this portion of the waterfront between high and low tide, as well as out into deep water is of such a nature that it is unfit for the anchoring of vessels or the driving of piles for the construction of either a fish trap or a wharf. Alexander, the appellee or defendant, con-

cedes in his testimony, that practically all of that portion of the upland lying westerly of a point where, if the lead of the trap was extended, it would intersect the lower boundary of the upland, is entirely cut off and obstructed by reason of the fish trap. We believe that in considering the testimony whether or not the fish trap of the defendant interferes with the plaintiff's right of access to navigable waters and the ingress and egress from and to the upland to navigable waters, the testimony of Captain Thornton, Mason, and Carlson, should be given great weight. No other navigators have testified. The defendant called Captain Rowe, he is a man who runs and operates a gasoline boat which he owns, but he nowhere contradicts the testimony of Captain Thornton and Mason and Carlson pertaining to the fish trap obstructing egress to and from the upland to navigable waters. Then, too, arises the question as to the use which Barron had put the water in front of this property to, in the way of anchoring vessels which he used in connection with his business. We say without fear of successful contradiction that it conclusively appears from the evidence that this little cove in front of Survey 804 is a harbor, and prior to Alexander constructing his fish trap therein, on or over, was used by Barron



as a harbor and anchoring place, but that the utility of the same for this purpose has been entirely destroyed by the erection and maintaining of this fish trap. If any witness ever tried to explain that this place has not been destroyed as a harbor by reason of this obstruction their reasoning is manifestly wrong. And this can readily be ascertained by viewing the maps and plats that are conceded to be correct, and observing the manner in which the structure in question is erected and its relative position as to the upland and the spit that makes out near the westerly end of the same. In the face of these undisputed facts we do not see how it was possible for the trial court to arrive at the conclusion that it did and made the finding complained of.

From the foregoing state of undisputed facts the court then, should in our judgment, have granted the restraining order prayed for in the amended and supplemental complaint, the only feasible way to appellant's upland having been entirely cut off by the action of appellee. We further contend that under the law the appellant is entitled to free and unobstructed access from every foot and point of his upland or water frontage to the navigable waters of Chatham Straits and call the court's attention to

the following authorities which we believe support our contention:

“The owner of land bounded by navigable waters has a right of free communication between his premises and the navigable channel of the river. This riparian right of access is strictly the right of access to the front of the property and does not include the right of access to the sides of piers. The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability, and is the same whether the land abuts on tidal or non-tidal water. *This right of access is property*, and while the right does not prevent the state from assuming jurisdiction and control over the bed and banks between high and low water marks, yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought, except where the right has been obtained by eminent domain or the interference is the improvement of the navigation of the river by the state or regulation of commerce by congress. Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction.”

29th *Cyc.* 336E.

Citing: *Juneau Ferry Co. vs. Alaska S. S. Co.*, 1 Alaska, 533;

*Sutter vs. Heckman*, 1 Alaska, 81;

*McCloskey vs. Pac. Coast Co.*, 160 Fed., 795;

*Lewis et al. vs. Johnson*, 76 Fed., 476.

This right of access is property.

22 *Cyc.*, p. 336E.

The court in the case of *Shirley vs. Bishop*, 8 Pac., 83, says:

“The free access to that ‘public water highway’ was a vested right and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention. \* \* \* If the wharf of the defendants could be built, and was allowed to stand, it would preclude the plaintiffs from building any wharf as to *sixty feet of their water front* of said block of land, and this effect upon their land, in the absence of all compensation, would, if not prevented, result in injury grievous and irreparable, from which, as threatened, they should have relief.”

“The owner of premises bounded by a navigable stream has, as a riparian proprietor, the right of access to the navigable part of the river in front of his premises, and the right to make a landing, dock, wharf or pier for his own use, or the use of the public; but such structure must not encroach upon navigable waters and vessels, and the commerce navigating the stream must not be impaired in their passage, or precluded from the use of all parts of the stream which are navigable in fact. *These rights are property*, and the riparian owner is entitled to compensation for their destruction or impairment.”

*Paine Lumber Co. vs. United States*, 55 Fed., 855.

“Citizens of the United States claiming, in good faith, uplands in Alaska and in actual occupation and possession thereof, take the same littoral rights as are incident to ownership in fee.

*Lewis vs. Johnson*, 76 Fed., 476.

“Among these is the right of access over and across abutting tide lands to deep water.”

*Id.*, 476.

“Equity would interfere by injunction to prevent the *impairment or destruction of such right.*”

*Id.*, 476.

“A littoral owner, while not entitled to wharf out on the tide lands in front of his property, is entitled to an injunction against the erection of any structure on such lands or in the water in front thereof, which would interfere with his right of access.”

*McCloskey vs. Pac. Coast Co.*, 160 Fed., 794.

“Under the common law the king was the owner of the bed of the ocean and of everything below the line of ordinary high tide, the littoral owner holding only to the line of ordinary high tide, with the right of access to the navigable waters in front of his land *and every part thereof*, though like a riparian proprietor he had a right to the water frontage belonging by nature to his land, a right distinct from the right of navigation.”

*Id.*, 794.

“The common law by Act of Congress, has been declared to be in force in the territory of Alaska.”

*Id.*, 794.

In the *McCloskey* case, *supra*, the court quotes with approval the following from *Gould on Waters*, Sec. 149, namely:

"A littoral proprietor like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon private rights, whether caused by a public nuisance or authorized by the legislature."

The court further says in the McCloskey case that

"There can be no doubt, therefore, that the appellee, while it had not the right to wharf out on the tide lands in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at *all points in front thereof*, and was entitled to an injunction against the erection of any structure on the tide lands, or in the waters in front thereof, which would interfere with such access."

#### Citing

*Gould on Waters*, Sec. 547;

*Lyons vs. Fishmonger Co.*, 1 App. Cas., 662;

*Shirley vs. Bishop*, 67 Cal., 543;

*San Francisco Sav. Union vs. Pgr. Petroleum Co.*, 27 Pac., 823.

"An owner of lands in Alaska, which border on tidal waters has no title to the soil below high water mark, and cannot enjoin the maintenance of a wharf or other structure *in aid of navigation thereon, unless it prevents his own free access to the navigable waters.*"



*Becker vs. Pac. Coast S. S. Co.*, 161 Fed., 974.

“An equitable owner or claimant of government lands in Alaska on the sea shore *may convey his littoral right to an individual or corporation to enable such grantee to erect and maintain a wharf for the benefit of commerce and navigation.*”

*Id.*, 974.

Morrow, C. J., in the opinion of above case refers to the case of *Columbia Canning Co. vs. Hampton*, 161 Fed., 64, in which last named case it was held:

“That the littoral right attached to plaintiff’s homestead location entitled him to free access to the navigable waters of Lynn Canal, but not to build on the shore or to erect any structure reaching out to deep water, *so as to obstruct navigation.*”

In the Decker case, *supra*, the Appellate Court quotes from the Columbia Canning Company case as follows:

“He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters.”

And, continuing, the court further says in said Decker case that

“This is the general rule, and is designed to keep navigable waters free and open to the public for *commerce and navigation*, and at the same time permit the littoral owner and those engaged in

*commerce and navigation* to have access to navigable waters; but it cannot be ascertained from the allegations of the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant's premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated, rather than obstructed, by the maintenance of a wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau."

The case of *Columbia Canning Co. vs. Hampton*, 161 Fed., 60, was an action to restrain defendants from interfering with or obstructing the plaintiff in the use of a structure which he had commenced to erect for a fish trap at a point on St. Mary's Peninsula, on the north shore of Lynn Canal, a navigable arm of the North Pacific Ocean in Alaska. No question in case was involved concerning access to navigable waters.

And Morrow, C. J., in the opinion in said case, at pages 64 and 65, states as follows:

"It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high water mark, and he can have therefore no right of possession upon which he can base an action against an intruder

whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high water mark. *He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case.*"

"Where a homestead entry in Alaska was bordered on one side by the meanders of the tide waters of Orca Inlet, the entryman, as the owner of the upland, though acquiring no title to the shore or soil below high-water mark, was entitled to free and unobstructed access to the navigable water, and for that purpose to construct a wharf over such land without interference by third persons claiming the right to use the shore."

*Dalton vs. Hazlet*, 182 Fed., 562.

In the above case, the plaintiff was the owner of the upland and had commenced the construction of a wharf directly in front of said upland. The defendants went upon the tide land in front of said wharf and plaintiff's upland and commenced driving piles, etc., and interfered with the access of plaintiff to the navigable water by means of said wharf.

Morrow, C. J., in the opinion in the foregoing case, on page 572, says:

"It is further contended that under the law of littoral ownership as it exists in the territory of Alaska the plaintiff has no cause of action against an occupant of tide flats in front of his upland. This contention is based upon the law of littoral

ownership in a territory as declared by the Supreme Court in *Shirley vs. Bowlby*, 152 U. S., 58, where the court said: "Grants by Congress of portions of the public lands within a territory to settlers thereon though bordering on or bounded by navigable waters convey of their own force no title or right below high water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of upland to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States."

"But the plaintiff in the present case does not claim any right or title to the soil below high water mark; what he claims is free access to the navigable waters in front of his upland, which it appears is being obstructed by the defendant."

"The owners of uplands and shore line have a right to pass out over tide lands to deep water, subject to the rights of commerce and navigation."

*Juneau Ferry Co. vs. Alaska S. S. Co.*, 1 Alaska, 533.

"The owner of upland bordering on the seashore in Alaska has the right of ingress and egress between his land and the sea over tide lands. Injunction will protect him in the exclusive enjoyment of his rights."

*Sutter vs. Heckman*, 1 Alaska, 82.

Wickersham, Judge, in his opinion in the case of *United States vs. Roth*, 2 Alaska, 257, on page 264, says:

"In this case it is conceded that the homestead claimant was in the actual occupation and possession of a part of the land described in his homestead

entry, and no prior adverse possession is alleged or shown by the stipulation. Upon the facts and the law, it must be held that he was also in constructive occupation and possession of the whole of the homestead described in his notice of location as well as the whole of the shore land in the Chem River in front thereof. His occupation and possession of the abutting upland was an occupation and possession of the valuable property which he possessed in the shore lands below high-water mark."

"But whether the title of the owner of such lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public subject to such general rules and regulations as the legislature may see fit and proper to impose for the protection of the rights of the public, whatever those may be."

*Yates vs. Milwaukee*, 77 U. S., 497.

"The riparian right is property and is valuable and though it must be enjoyed in due subjection to the *rights of the public*, it cannot be arbitrarily or capriciously destroyed or *impaired*. *It is a right of which when once vested the owner can only be deprived in accordance with the established law and if necessary that it may be taken for the public good upon due compensation.*"

*Id.*, —.

From a perusal of the foregoing cases there is nothing to indicate that such access in any manner depends upon the extensiveness of the use to which



such upland is put, or that such access is limited to any particular part of the upland fronting on navigable waters; or that such access *merely* means to be able to reach any part of the upland as a whole. On the contrary some of the authorities cited clearly hold that the littoral proprietor is entitled to access from his upland to the navigable waters and from every front foot of his upland, and that he has a right to the water frontage belonging by nature to his land, etc., and such littoral owner is entitled to compensation for their *destruction or impairment*.

*Shirley vs. Bishop*, 8 Pac., *supra*;

*Paine Lumber Co. vs. U. S.*, *supra*;

*Lewis vs. Johnson*, *supra*;

*McCloskey vs. Pac. Coast Co.*, *supra*;

*Gould on Waters*, Sec. 149.

Some of the foregoing cases subject the exercise of such littoral right to the rights of the *public and commerce and navigation*, but we shall discuss this phase under the next heading.

### III.

*The court below erred in holding that under the evidence in the case the appellant had reasonable access to the navigable waters of Chatham Straits, and in further holding that, as against the rights of*

*the appellee, appellant is only entitled to reasonable access from his upland to the deep waters of said straits.*

In considering the matters under the foregoing head we will make two sub-divisions thereof.

*First.* We contend, that, if the doctrine of reasonable access applies in this case, then Barron had not reasonable access to his upland from the navigable waters of Chatham Straits, by reason of Alexander's structure.

We contend that it has been shown by a great preponderance, if not by the uncontradicted evidence, that the only *reasonable*, feasible or practicable place for landing steamers or water craft has been entirely destroyed and cut off from Barron's upland by Alexander's structure. He admits that the sandy beach lying between his fish-trap and what would be the prolongation of the west end line of Survey 804 is the "*most natural*" place for the landing and the reaching of Barron's upland. Barron, Mason, Thornton and Carlson, all of the witnesses who are competent to testify on this subject, have testified to it. Reasoning from the evidence leads us to this inevitable conclusion. The maps and plats taken together in connection with the evi-

dence, absolutely demonstrate this fact.

It has been shown in this brief, both as a matter of fact and as a matter of law, that Barron initiated his rights to the upland and used the waters abutting thereon and in this little cove, for reaching his upland, and anchoring his vessels, long before Alexander ever made any claim whatsoever to his fish-trap location. It further appears that Barron used the ground and that part of the cove and water and waterfront that is cut off by Alexander's structure, for the purposes above indicated, long before Alexander initiated any claim of right to his fish-trap location. Is it possible then, that Alexander, who is a mere trespasser or an interloper, shall now come in and dictate to appellant as to what portion of his waterfront he shall use for the reaching of his upland and anchoring his vessels which he used in connection with his fishing business? If this matter of an outlet from the upland to deep water is a matter of choice, then we submit that Barron should have that choice, and had made it and selected his landing place, before Alexander ever appeared upon the scene; and it would appear manifestly unjust if now Alexander should dictate as to where and how Barron should reach his upland. If this doctrine of reasonable outlet applies, then we submit that Bar-

ron had the right to select his gateway, which he did, and this Alexander has unquestionably destroyed.

Taking into consideration that we have pretty thoroughly covered this phase of the case in the argument under our second division in this brief, we refrain from saying more.

*Second.* The trial court manifestly applied the wrong authorities to this case.

The cases which the court has cited in its opinion do not apply to the case. We know of no case that holds to this doctrine of reasonable access except in some instances where commerce and navigation, or the rights of the public in general, are concerned. Where a sovereign power, for instance, the state, owns or becomes the owner of tide lands in trust, or the United States or general government holds the tide lands in trust, which applies to the case at bar, and grants a right-of-way for any public purpose across tide lands to deep water, or wherever the way is being used for commerce and navigation, or the rights of the public in general are concerned, then the upland owner may be relegated to a reasonable outlet or reasonable access to deep water, or may be compelled to use his means of ingress and

egress in such a way that it would not interfere with commerce and navigation, or the rights of the public, or interference with any grant made by the sovereign power for the use or occupancy of either the tide lands or the water bordering on the upland.

We submit that the trial judge in arriving at his decision in this case has, in our opinion, made an application of cases involving commerce and navigation and the rights of the public in general, and that such cases have, in fact, no bearing upon this case.

We quote the following from the opinion of the trial judge in support of the above assertion, namely:

“Section 3 of an Act of Congress, entitled ‘An Act for the protection and regulation of the fisheries of Alaska,’ approved June 26, 1906, provides:

“‘That it shall be unlawful to erect any dam, barricade, fence, trap, fish-wheel or other fixed or stationary structure except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than 500 feet or within 500 yards of the mouth of any red salmon stream where the same is less than 500 feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful structures removed or destroyed.’”



Also, the following extract from the Decker case, *supra*, quoted in the opinion, viz.:

“This is the general rule and is designed to keep navigable waters free and open to the public for commerce and navigation and at the same time permit the littoral owner and those engaged in *commerce and navigation* to have access to navigable water; but it cannot be ascertained from the allegations in the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant’s premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated rather than obstructed by the maintenance of wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau.”

Evidently the judge of the trial court construed the word “commerce” as used by Judge Morrow in the *Decker* case, as synonymous with a private industrial enterprise. In other words, that the operation of the fish trap by the defendant comes under the definition of the word “commerce.” We do not agree, that Judge Morrow ever intended to convey such a meaning, for the reason that commerce and navigation are well defined in the law.

The word “commerce” embraces transportation by land and water and all the means and appliances necessarily employed in carrying it out.

*Cuban S. S. Co. vs. Fitzpatrick*, 66 Fed., 63;  
*Chicago & N. W. R. Co. vs. Fuller*, 84 U. S.,  
 560;

*South Carolina vs. Georgia*, 93 U. S., 4;

*Hannibal & St. J. R. Co. vs. Husen*, 95 U. S.,  
 465.

Also see *Words and Phrases*, Vol. 2, p. 1292.

“From the adoption of the Constitution, the universal sense has been that the word ‘commerce,’ as used in that instrument, is to be construed as a generic term, comprehending navigation, or that a control over navigation is necessarily incidental to the power to regulate commerce.”

*Words and Phrases*, Vol. 2, p. 1292.

Citing *Wilson vs. United States*, 30 Fed. Cas.,  
 239.

We are satisfied that no such interpretation as evidently made by the trial judge can be properly applied to the words “commerce and navigation” as used by Judge Morrow in the *Decker* case, or as such words appear in any of the cases cited in the opinion in this brief, for it is too evident that the two words “commerce” and “navigation” are used interchangeably, and certainly mean *carrying on commerce by transportation*.

Surely, it cannot be said that the fishtrap of the defendant in front of the plaintiff's upland aids commerce and navigation, while on the other hand,

it might readily be held *to be an obstruction to commerce and navigation*.

We know of no law that holds that the owner of upland must so use his land as to necessitate access to navigable waters from every point thereof, excepting, only, where *commerce and navigation*, or the public generally, become a factor; and under such circumstances, probably, the upland owner might be restricted to such access from his upland to navigable waters co-extensive with such use.

But can a mere stranger place a structure in front of this upland, which does not aid access to the navigable waters therefrom, but cuts off, or limits, such access, and does not in any way aid commerce and navigation?

We fail to see upon what theory of the law the owner should be deprived of his littoral rights or the exercise of such rights to the full extent of his water frontage. For whose benefit is this littoral right of 552.64 feet fronted by the fish-trap in this case withdrawn or taken away from the owner of the upland? Is it to aid the public ingress and egress to and from the upland to navigable water or to permit a stranger, as distinct from the public, to carry on an enterprise which is clearly a hind-

rance to the public ingress and egress to and from the upland to navigable water?

In this connection we call attention to the fact that between every survey bordering on navigable waters in Alaska, excepting only mineral claims, a space of eighty rods is reserved by the Government. The purpose of this reservation is evidently to protect and preserve to the public access to the navigable waters, and by implication Congress has indicated or recognized the fact that in case of homestead entries the owner of the upland is entitled to his water frontage and the Government has reserved each alternate eighty rods and withholds it from entry in order to preserve *this water frontage* and prevent private owners from controlling it.

We think we have already covered this matter, and have nothing further to add, except that our contention is that the littoral right of the upland owner is absolute to every foot of the upland, subject only to the paramount right of the public for commerce and navigation, as commerce and navigation are defined in the law.

#### IV.

*The court below erred in visiting and viewing the premises in controversy or the situs of the fish-*

*trap after the close of the case for the following reasons:*

*First, For the reason that the judge did so of his own free will and accord and not at the request or solicitation of either of the parties to the action, after there had been a change in the structure or fish-trap complained of in the amended and supplemental complaint; second, for the reason that the court misused and misapplied the information or knowledge thus gained to the prejudice of and in a way or manner that materially affected the substantial rights of appellant.*

*The court below erred in not granting the plaintiff below a new trial or rehearing upon the showing made.*

It is conceded in this case that, after the trial had been finished, the argument of counsel made, and the cause submitted to the court for its decision, or for the entering of a decree, the court, of its own accord, visited the premises in controversy, or the situs of the fish-trap. The court states in its opinion that the lead line of the trap had been changed, "thus eliminating any possible question in the judgment of the court of its interfering with plaintiff's right of access from every point of his upland to the



navigable waters of Chatham Straits.” In other words, when the court arrived at the premises he saw another fish-trap other than the one complained of in the amended and supplemental complaint. The order which the court made in overruling and denying the motion for a new trial or rehearing herein, which is set forth in this brief, and found at page 52 of the record shows that this changed condition of the fish-trap had great weight with the court in arriving at its final conclusions herein and the rendering of the decree. In that order the court states, “That the change made in the construction of the fish-trap by the said defendant does not cause the same to in any way interfere with plaintiff’s free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits.” Alexander destroyed the very evidence or object which the court visited to see. This destruction of this evidence, when Alexander knew that the court intended to visit the premises, is evidence against Alexander, showing that he believed the way his fish-trap was constructed as set forth and described in the amended complaint herein did obstruct Barron’s free access to his upland.

“The presumption is that the contents of a written instrument were unfavorable to one who has deliberately destroyed it.”

*Tauton vs. Keller*, 47 N. E., 376.

“The deliberate destruction of evidence \* \* \* gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator.”

16 *Cyc.*, 1059.

Now let us see what the object is in viewing premises either by court or jury.

“Ordinarily a court will not permit a view where there has been a change in the condition of the *locus*, though it may do so.”

22 *Ency. Pl. & Pr.*, 1057.

Citing *Sell vs. Ernsberger*, 8 Ohio Cir Ct., 499, 4 Ohio Cir. Dec., 100, wherein it was held that in an action against a road supervisor for digging an uncovered trench on a highway, in front of the entrance to his building, it was error to allow the jury to view the premises, the condition of the trench having changed since it was dug.

“The view may be granted, although the condition of the property has changed since the time of the injury complained of, if the change is not material; but it should not be granted where it appears that material physical changes have occurred in the character of the premises between the time of the injury and the time of trial, \* \* \*”

38 *Cyc.*, 1313 J.

In the case of *Holladay-Klotz Land and Lumber Company vs. T. J. Moss Tie Co.*, 79 Mo. App., 543, it was held error to allow plaintiff to show change in a suit begun before the change was made.

“The object of a view is not to furnish the jurors with evidence upon which to found their verdict, but to enable them better to understand and apply the evidence presented in court.”

22 *Ency. Pl. & Pr.*, 1054,

Citing *Wright vs. Carpenter*, 50 Cal., 556;

*Groundwater vs. Washington*, 92 Wis., 56.

“Accordingly the jurors cannot use the result of their examination on a view as independent evidence in the case, though they may take it into consideration in connection with the evidence introduced at the trial.”

22 *Ency. Pl. & Pr.*, 1055.

“As a rule a view by the jury is ordered only in cases where the facts involved are such that they cannot be accurately described to the jury, and where such view will better enable the jury to understand and apply the evidence.”

22 *Ency. Pl. & Pr.*, 1055.

“The deliberate destruction of evidence \* \* \* gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator.”

16 *Cyc.*, 1059.

The foregoing citations refer apparently to jury cases. However, in the trial of equity causes the

judge acts in a dual capacity of court and jury—judge of both law and fact. While acting as judge of fact he is human and apt to err. He arrives at conclusions of fact the same as a jury, and in doing so is governed by the same principles as a jury, and moved by the same impulses and motives. What would affect an enlightened juror will affect a judge. Hence we believe the trial judge, in arriving at his findings of fact, and in the rendition of the decree herein, misconceived the object of his visit to the premises in controversy and *locus* of the fish-trap. In the language of the decision, “The object of a view is not to furnish the jurors (the judge in this case) with evidence upon which to found a verdict (in our case, the making of findings of fact), but to enable them (the judge) better to understand and *apply the evidence presented in court.*”

*Supra*, 22 *Ency. Pl. & Pr.*

*Wright vs. Carpenter;*

*Groundwater vs. Washington.*

Nor can the court use the result of the examination and a view of the premises as independent evidence in the case.

*Supra*, 22 *Ency. Pl. & Pr.*

Surely, in this case, where the physical conditions existing upon the ground and over the water,

as set forth in the pleadings and the evidence and testimony introduced, had been entirely changed and destroyed, when the judge reached the premises, there was nothing upon which *a view* of the premises or *locus* of the fish-trap could be predicated. The condition of the fish-trap as changed was not an issue in the case tried. And this changed condition had great weight with the judge, for he refers to it both in his opinion and in the order overruling the motion for a new trial and rehearing. The court used knowledge and information thus gained by his visit for a purpose that is in direct opposition to the law. Barron has not had his day in court on these changed conditions and has not had an opportunity to show whether or not these changed conditions interfere with his free ingress to the upland and free egress therefrom to navigable waters. We contend that navigation is a science. As to what constitutes free and unobstructed, or *even reasonable*, ingress to or egress from, Barron's upland to navigable waters of Chatham Straits, is a matter of proof; and such proof should be made by the testimony of expert witnesses, or persons who have had experience in navigation of water crafts, the tying up and anchoring of the same, and so forth. The court in the case at bar, while it could act in a dual capacity, being both judge of law and fact in the case, could



not by its own judgment supply the facts. How does he know that the changed condition "eliminates any question of free access to the waters of Chatham Straits or free ingress from the waters to this upland?" How is the appellate court going to determine this fact when there is not a scintilla of evidence or proof on this phase of the case. It might be a happy condition of affairs if, under the Constitution and our institutions, and in the administration of justice and trial of cases the taking of evidence could be dispensed with, but as yet we have not reached that stage of perfection in the trial of causes. The action of the court in this matter was made the grounds of a motion for new trial or rehearing, and has been preserved as one of the errors in the case. We submit, however, that upon the great preponderance of the evidence, if not upon the uncontradicted facts in this case, the relief prayed for in the amended and supplemental complaint should have been granted, and we believe that this Honorable Court will concur in this, and will give unto the appellant that which he has prayed for.

Very respectfully submitted,

JNO. R. WINN and

N. L. BURTON,

Attorneys for Appellant.



47

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2171.

JAMES T. BARRON,

Appellant,

vs.

CLAIRE J. ALEXANDER,

Appellee.

**BRIEF OF APPELLEE.**

Upon Appeal from the District Court for the  
District of Alaska, Division No. One.

**STATEMENT OF FACTS.**

The undisputed facts, as shown by the evidence in  
this case, are substantially as follows:

That James T. Barron, the appellant, claimed to  
be the owner and in possession of a tract of land,  
consisting of 5.27 acres, located on the south shore  
of Admiralty Island, in the Territory of Alaska,  
known as Survey No. 804-B; that said land has a  
frontage on Chatham Straits, an arm of the Pacific  
Ocean, of approximately 800 feet. That in the  
spring of 1911, appellee commenced the construction  
of a fish-trap in the waters of Chatham Straits, op-  
posite and in front of said tract of land, and com-  
pleted the same prior to the trial of this suit; that  
said fish-trap, as located and driven by appellee, was  
entirely below the line of extreme low tide and in  
the navigable water of Chatham Straits. That said  
tract of land was a barren waste covered by forest  
and boulders and was wholly unimproved, with the

exception of a so-called cabin without roof, floor, window or door. (See Photograph, Defts. Ex. 10, P. R., 582.) That Claire J. Alexander, the appellee, is a citizen of the United States over the age of twenty-one years and a resident and inhabitant of the Territory of Alaska; that appellee fished said trap during the season of 1911, making a profit thereby of \$10,000, and the cost of construction of said trap was \$6,000; that said fish-trap was not located within 1800 feet of any other fish-trap in that vicinity.

The only material question in dispute in this case is as to whether or not appellee's fish-trap obstructs appellant's right of access, over the tide lands, from the navigable waters of Chatham Straits to his upland; or, in other words, his right of ingress and egress over said tide lands to and from his upland. In this question is included also the controversy, as shown by the evidence, with reference to the location of the trap, the contour of the shore land, the feasibility of building a wharf, the depth of the water, and the purposes for which appellant intended to use his upland. Upon these disputed questions of fact, the trial court made its findings. Finding of Fact III (P. R., 50) covers the questions in dispute between the parties litigant. Said finding is as follows:

“That defendant's fish-trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep

water of said Chatham Straits; that the operation of said fish-trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish-trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits."

Chapter 39, section 372, of the Alaska Code of Civil Procedure, relating to questions of an equitable nature, reads as follows:

"All issues of fact in actions of an equitable nature may be tried by the Court, and if tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions: *Provided*, The Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part



of the judgment roll of the case; and such findings of fact shall have the same force and effect, and be equally conclusive, as the verdict of a jury in an action. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or such further time as the Court may allow."

### ARGUMENT.

I submit, as a proposition of law, that this Court will not reverse the findings of fact made by the trial court in this case, unless

(1) Some serious or important mistake has been made in the consideration of the evidence; or

(2) An obvious error has intervened in the application of the law.

Cook vs. Robinson, 194 Fed. 753 (Alaska);  
 Thorndyke et al. vs. Perseverance Mining Co.,  
 164 Fed. 657 (Alaska);

North American Exploration Co. vs. Adams,  
 104 Fed. 404;

Coder vs. Arts, 152 Fed. 943;

Stewart vs. Hayden, 72 Fed. 402;

Paxton vs. Brown, 61 Fed. 874;

Warren vs. Burt, 58 Fed. 101;

DeLaval Separator Co. vs. Iowa Dairy Separator Co., 194 U. S. 423;

Tilghman vs. Procter, 125 U. S. 136;

Stanley vs. Board of Supervisors, 121 U. S. 535;

Dooley vs. Pease, 180 U. S. 126;  
 Lehnén vs. Dickson, 148 U. S. 71;  
 Kimberly vs. Arms, 129 U. S. 512;  
 Hathaway vs. First National Bank of Cambridge, 134 U. S. 494;  
 Furrer vs. Ferris, 145 U. S. 132;  
 Rust et al. vs. Strickland, 28 Pac. 141.

Does the record show that the trial court made any serious or important mistake in the consideration of the evidence? The appellant testified that defendant's fish-trap did obstruct the entrance from Chatham Straits to his upland; that it was absolutely impossible for a fishing boat to go in between the trap and the point marked "bare rock" (Pltf's Ex. D.); that the spot described as a sandy beach on the west end of the claim was the only feasible landing-place upon the shore; that the feasible place to build a wharf from appellant's upland was on the west end of the claim; that he intended, if successful in this suit, to use the premises as a fishing station and to build a fish-trap in identically the same place where appellee's trap is located. (P. R. 257, 277, 279, 285 and 289.) He also testified that if he prevails in this suit he intends to use his premises for the purpose of building a wharf there (P. R. 291) and repeats the same statement (P. R. 296). He also testified that if successful in this suit, he intends to convert the fish-trap site into a place to store combustibles, such as naphtha and gasoline. (P. R. 301.)

Ed. Thornton, a witness for appellant, also testi-

fied that the fish-trap obstructs appellant's access to his upland, that it was a menace to navigation, and that it was impossible to navigate a boat between the trap and the point marked "bare rock" on Plaintiff's Exhibit "D." (P. R. 416-436.)

Charles Carlson, a witness for the appellant, corroborated the testimony of Captain Thornton. (P. R. 437-448.)

P. H. Mason, a witness for appellant, testified as follows (P. R. 369):

"Q. (By Mr. WINN.) I will ask you, Captain, as to whether or not this trap, then, as it is now constructed, would obstruct the ingress and egress into and from this upland over this route that you have just described?

"A. This trap, as it stands—the situation is now—absolutely obstructs the whole harbor.

"Q. And when you say the whole harbor, do you mean the whole frontage of Barron's claim?

"A. The whole frontage of Barron's claim. The frontage of this bare rock here, as you have termed it."

Appellant also introduced a map (Pltf's Ex. "D," P. R. 164) from which Mr. Lloyd Hill testified as to the location of the uplands, trap, depth of water, and various objects shown on said map. All the witnesses for the appellant testified that the only feasible place to build a wharf from the upland, extending to deep water of Chatham Straits, was on the west side of Survey No. 804, and that if such wharf were constructed it would intersect with appellee's fish-trap.

The testimony of appellant's witnesses, taken in connection with Plaintiff's Exhibit "D" (P. R. 164), shows that Alexander's trap is located entirely in the navigable water of Chatham Straits. It shows that there are eight feet of water at low tide at the pile in the lead of said trap, nearest the shore, and that the outside or face of the trap stands in over 40 feet of water. There is a line of soundings, shown on Plaintiff's Exhibit "D," running from near the bare rock to the lead pile showing: 21' 21' 18' 18' 16' 12' 10'. It also shows that it is 140 feet from the nearest pile in the trap toward the shore, to the line of low tide. (Pltf's Ex. "D," P. R. 164.) Mr. Hill testified that these soundings were made by him about one o'clock P. M., March 11th, 1912, less than one hour before low tide, and he based his figures on the lowest tides of that month (P. R. 171); and appellant's witness, Captain Thornton, testified that these soundings taken an hour before low tide would not make more than six inches difference (P. R. 435); therefore, there would be  $7\frac{1}{2}$  feet of navigable water at the lead pile nearest inshore at the extreme low tide for the month of March, 1912.

Now, taking the testimony of Mr. Birkinbine, the witness for the appellee, showing that the rise of the tide is 23.09 feet, and adding one-half of this number, or 11.545 feet, to the 7.50 feet, we find that during the month of March, 1912, the actual average depth of water at the lead pile nearest the shore of appellee's fish-trap, was 19.045 feet, and that during June, 1912, it was 15 feet. (See testimony of H. P. N. Birkinbine, P. R. 609.)

The undisputed testimony of all the witnesses shows that the water is much deeper on the east side of the trap than on the west side of the trap. (See testimony of P. H. Mason, P. R. 384.) Fifteen feet of water is navigable water for all kinds of craft ordinarily used by fishermen and cannery-men in Alaska.

Plaintiff's Exhibit "D," as well as Defendant's Exhibit 4, directly contradicts the oral testimony of appellant and his witnesses upon the question of access to the uplands. The photographs, Defendant's Exhibits 5 and 6 (P. R. 570 and 575), contradict the testimony of the plaintiff upon this point. Exhibit 5 conclusively shows that the land is low and flat on the east end of appellant's claim and that the uplands are accessible from the water at this point. Mr. Birkinbine further testifies that all parts of Survey 804 are accessible from the place where Defendant's Exhibit 5 was taken; that he walked along the entire length of the claim from this point, carrying his surveying instrument with him. (P. R. 565.) Mr. Birkinbine's testimony also shows that it is 421 feet from the bare rock to the nearest pile of defendant's trap. (P. R. 559.) Even a hasty perusal of the evidence shows that no serious or important mistake was made by the trial court in the consideration of the evidence in this case. Certainly, there is some evidence upon which the trial court based these findings of fact.

In the decision in the case of Rust et al. vs. Strickland, Judge Reed says:



“The only other question presented for review is the sufficiency of the evidence to sustain the decree. The testimony is very voluminous, and, upon some important points, conflicting and contradictory. We have examined it very carefully, and conclude that the decree must be affirmed. It is not enough that this Court should differ in judgment from the Court below as to the preponderance of evidence upon reading the transcript, nor that, upon such reading, it would be inclined to enter a different decree. The witnesses are personally before the trial court, which has far greater opportunity of justly determining their credibility than this Court can have. We can only reverse when—First, there is an absolute want of evidence to sustain the decree; second, when the decree is so manifestly against the weight of evidence as to show it to be the result of bias or prejudice. This rule has been so often asserted in both the Supreme Court and in this court that citations of the different decisions are wholly unnecessary. This case does not come within either of the above exceptions to the rule. It might seem to a court of review that upon some questions the decree was against the weight of the evidence, but it cannot be said to be without testimony to support it. In cases of this kind where the evidence is not only conflicting, but the statements of witnesses diametrically opposed, the result must depend in a great measure upon the credit given the witnesses respectively. This

Court has no opportunity to judge individual credibility. These being the only questions for review, the judgment of the District Court must be affirmed.”

Rust et al. vs. Strickland, 28 Pac. 142.

Has an obvious error intervened in the application of the law by the lower court? Counsel for appellant, in their brief, cite a number of cases in support of their theory of the law applicable to the facts and incorporate brief excerpts from the decisions to which they refer. I will briefly consider these cases:

Juneau Ferry Company vs. Alaska Steamship Company, 1 Alaska, 535; Id., 125 Fed. 356.

The question considered there referred solely to the right of the defendant to wharf out. The lower Court held that the owner of uplands has no title to tide lands in Alaska but has a right to pass out over the tide lands to deep water. Upon appeal, however, it was held that no question of littoral rights was involved in the case.

McCloskey vs. Pacific Coast Co., 160 Fed. 794.

Defendant was attempting to erect a building *on the tide lands* in front of plaintiff. The Court says:

“But notwithstanding that the theory upon which the Court below awarded this injunction may have been erroneous, the injunction must not be disturbed if from the pleadings and the proofs we may discover any tenable ground upon which it may be sustained. We find such ground in the fact shown by the bill and in the proofs that the appellee’s grantors, at the date

when the Act of Congress of May 17, 1884, was enacted, claimed the possession and the right of possession of all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk.”

To the same effect is the case of *Heckman vs. Sutter*, 119 Fed. 83; *Id.*, 128 Fed. 393.

The decision of the lower Court was affirmed, but such affirmation was based entirely upon a different theory than the one held by the Court below, viz., for the reason that the plaintiff and other grantors had held possession of the premises ever since and prior to the Act of May 17, 1884 (23 Stat. at L. 24).

The foregoing cases do not seem to be applicable to the case at bar, for the reason: First, that in the case at bar no claim is made by appellant of any title under the Act of May 17, 1884; and second, that in the foregoing cases the Court was dealing with a trespass actually committed upon the tide land between ordinary high and low tide, while here we are dealing with a structure located out beyond even extreme low tide, in the navigable water, which structure cannot, in the very nature of things, prevent appellant's access over the tide lands to his uplands. In going to his upland, appellant does not begin his passage over the tide lands until after he has passed a distance of more than 140 feet beyond the fish-trap. (See Deft's Ex. 4, distance from lead pile to ordinary low tide.)

The gist of the decision in the case of

*Lewis vs. Johnson*, 76 Fed. 476,

is to the effect that a person in possession of upland,

without title in fee simple, has the same littoral rights as an owner in fee simple, viz., a right of access to navigable water.

In the case of

Dalton vs. Hazlett, 182 Fed. 561,

the Bill of Exceptions was not made a part of the record, and the Court held that the substantial merits of the case could only be considered on appeal as shown by the pleadings, findings of fact, conclusions of law, and the decree. The facts found by the lower Court were briefly these: Hazlett applied for an injunction to restrain Dalton et al. from constructing and maintaining a wharf on the tide lands in front of plaintiff's wharf and upland on the waterfront of the town of Cordova, Alaska. That on June 10, 1908, plaintiff commenced the construction of a dock or wharf upon the land owned by him in fee, above the line of mean high tide, with the intention of continuing same over the tide lands lying immediately in front of and abutting upon his upland, to deep water. Defendant entered upon the tide land immediately in front of plaintiff's wharf, and for the purpose of hindering and preventing plaintiff from continuing his wharf to deep water, and commenced driving piles and covered a place 68 feet wide by 130 feet long. The tract of land occupied by defendant was between the line of mean high and low tide, and was directly in front of the wharf being constructed by plaintiff, and was between the land owned by plaintiff and deep water, and was so constructed as to prevent plaintiff from completing



his said wharf to deep water; that defendant's structure prevented plaintiff, and the public generally, from landing boats or barges of light draft at the outer edge of this wharf; that plaintiff's wharf was a public necessity, being necessary to the inhabitants of the town for the purpose of bringing in lumber, material and supplies. The Appellate Court affirmed the decree granting an injunction. The case, as considered in the Appellate Court, was exactly the reverse of the case at bar, because there the lower Court found as a fact that the defendant's structure *did interfere* with and actually cut off plaintiff's access to his upland; while here, the Court has found as a fact that the appellee's fish-trap *does not* interfere with nor cut off appellant's access to his uplands, and furthermore, there defendant's structure was actually on and in the tide land, while here, appellee's structure is far below tide land and in the navigable waters of the ocean. Appellant's right of access to navigable water means his right to reach water capable of navigation by such craft as he might need in the carrying on of his business. The testimony shows that the only boats used in the fish business, outside of the fishermen's small boats, are the gasoline boats, and that the largest one of these owned by appellant does not draw more than 8 feet of water. Appellant's own witness, Mr. Hill, testifies that there was approximately 8 feet of water at extreme low tide at the lead pile in appellee's fish-trap in March, 1912, or, as I have shown on page 7 of this brief, there is over 19 feet of water at the lead pile at average sea level. Can it be said



that appellant, in going over the tide lands from his uplands to the navigable water, has not reached navigable water when he arrives at the lead pile of appellee's trap?

In *Decker vs. Pacific Coast Co.*, 164 Fed. 974, it did not appear from the record that plaintiff was prevented by defendant from having free access to navigable water, and for that reason the action of the District Court in refusing the injunction upon this and other grounds was affirmed. The Court, in effect, held that the mere fact that defendant erected buildings on the tide land, in front of plaintiff's upland, did not entitle plaintiff to an injunction unless it was further shown that plaintiff's access to navigable water was thereby cut off.

Replying to the contention of the learned counsel for the appellant, that the question of access to appellant's upland must be considered with reference to the space of navigable water included within the end lines of Survey 804, prolonged indefinitely into the waters of Chatham Straits, as appears from Plaintiff's Exhibit "D," and that in computing the area of navigable water in front of the upland, the distance must be measured between appellee's trap and these imaginary lines: I suggest that counsel's position is unique in the history of the law concerning littoral rights. However, their ingenuity may be commendable, in the prolongation of these imaginary lines, in order to support a theory never before advocated by lawyers. But why stop in the middle of Chatham Straits? Counsel gives no explanation in the brief.

The sea, from time immemorial, has been a public highway open to all the world for commerce, navigation and fishery. There are no lines laid down in the trackless waste of the ocean at all analogous to the boundaries of tracts of land bordering thereon. If appellant ever should have occasion to enter upon this barren waste of worthless land included in Survey 804, from the waters of Chatham Straits, his right of access will not depend upon the direction his vessel runs. He may reach this land from the southeast, the southwest or the south. If, however, the land adjoining him should at some future time be taken up and occupied by others, it will then be soon enough to have his rights in the shore land established and determined by a court of equity.

Martin vs. Heckman, 1 Alaska, 165;

Hedges vs. West Shore Ry. Co., 44 N. E. Rep. 693.

See Statement by Judge Lyons (P. R. 236).

With reference to the visit of the trial Judge to the *locus in quo*, it is a matter of regret that counsel in their brief have seen fit to compare the learned, painstaking trial Judge to an ordinary jury of twelve laymen. Judge Lyons undertook the long, tedious journey to view the premises, not only for the purpose of elucidating the testimony of the witnesses and the other evidence in the case, but also out of abundant caution, that he might make no mistake in the exercise of his extraordinary power of injunction. Neither counsel for the appellant nor counsel for the appellee made any objection to the course pursued

by the trial Court. The order of the trial Court overruling appellant's motion for a new trial (P. R. 52), in which order it is stated that "The change made in the construction of the fish-trap by the said defendant does not cause same to in any wise interfere with plaintiff's free ingress from the navigable water of Chatham Straits to his upland or to any part thereof, or free egress from his upland and all parts thereof to the navigable waters of Chatham Straits," is a sufficient answer to the *ex parte* affidavit filed by one of the counsel without notice to appellee or his attorneys, and without service thereof being made upon anyone.

The above statement by the trial Court does not indicate, as claimed by counsel for appellant, that the Court based its finding of fact No. III upon the condition of the trap at the time he viewed the premises, but it was made for the purpose of refuting the statement made by Jno. R. Winn in his *ex parte* affidavit, signed July 2, 1912, wherein the affiant says that Alexander "was engaged in constructing another fish-trap *immediately in front* of the shore land and upland of plaintiff." (See P. R. 719; also affidavit of Z. R. Cheney in support of motion to strike Winn's affidavit, filed in this court October 24th.)

It is a well-known fact that nearly all the fish-traps in Alaskan waters are carried away by the action of the water during the winter months and that all such traps must be either partially or entirely reconstructed in the spring.

After the trial of the case, the appellee did change

the lead of his trap, extending it in a northwesterly direction toward Corner No. 1 of appellant's Survey 804. (See opinion, P. R. 742.) But he left the old lead where it was, intact, until it was viewed by the trial Court. This was not done by appellee with any intention of affecting the trial of the case, but because it made a better fish-trap. The reasons for the change being made do not appear in the record, because counsel for appellant neglected to serve his affidavit, shown on page 718 of the printed record. (See proof of service of motion for new trial, P. R. 717.)

However, from a perusal of the testimony upon cross-examination of P. H. Mason (found on page 397 of the Printed Record), it does appear, at least by inference, that the appellee at the time of the trial contemplated changing the lead of the trap from the way it was then driven to the position in which the Court saw it at the time of his visit to the premises. The testimony is as follows:

“Q. Suppose that trap, instead of the lead line being the way it is, suppose the lead line over this way?

“A. I think it would be useless.

“Q. Well, I am not asking about whether you think it would be useless or not. I am asking you whether that would be a menace to navigation if that line instead of running the way it does now, ran over so it was tied to a post at a point, tied to the upland at a point to the west of survey number 804, would that be a menace to navigation then?

“A. No, sir.

“Q. Wouldn't be a menace to navigation?

“A. No, because anybody can go between the trap and the land and you would have plenty of water to the right, but I don't think anyone will ever run a lead that way.

“Q. You think that that lead has got to be just in that fix, in that direction and that angle approximately in order for a trap there to be of any use whatever?

“A. To make a fish-trap out of it.”

That the change contemplated by the appellee was made in accordance with the questions put to Mr. Mason on the trial, is shown by the words found in the opinion of the trial Court at page 742 of the Printed Record:

“Since the hearing of this trial, however, the Judge of this court, in company with counsel for both the plaintiff and the defendant, has had an opportunity to visit the situs of the fish-trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed, so that instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits.”



In view of the fact that counsel for appellant have used so much space in their valuable brief in commenting upon the good faith of the appellee, I may be pardoned if I call attention to the testimony of the appellant, Mr. James T. Barron, as bearing not only upon *his* good faith but also upon his credibility as a witness. Appellant is seeking in this suit a peremptory injunction against appellee, which, if granted, means the loss of a valuable structure which cost the appellee \$6,000 in cash and which yields him \$10,000 each season. On March 22, 1911, appellant filed his bill, in which no mention is made of his intention of building a wharf from his uplands. (P. R. 4.) On March 27, 1911, while in the midst of the first trial, Mr. Burton, realizing that he could not make out a case without some new theory to work on, had Mr. Fred Barker wire appellant as follows:

“Juneau, Alaska, Mar. 27, 1911.

“J. T. Barron,

Wells Fargo Bldg.,

Portland, Org.

“Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804, Alaska, out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable water and that you are sending affidavit to this effect.

“FRED BARKER. 8:08 P. M.”

Appellant obediently replied as follows:

“Portland, Ore., Mar. 28, 1911.

“To Newark L. Burton, Atty. at Law,

Juneau, Alaska.

“It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable water Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

“JAS. T. BARRON.”

Then on the second trial, March 18, 1912, Mr. Barron takes the stand in his own behalf, and in cross-examination testified as follows:

(P. R. 257.) “Q. (By Mr. JENNINGS.) Well, all right, if you don’t understand. What did you get this upland for, Mr. Barron?

“A. I got it for a fish station and a mooring ground and to use—anything in our line of business.

“Q. What do you mean by fish station? You didn’t expect to put a cannery on there.

“A. No, to use it for a fish-trap.

(P. R. 277.) “Q. (By Mr. CHENEY.) Mr. Barker wired you. That was for the purpose of protecting your property?

“A. Yes, sir.

“Q. You had no cannery buildings on this location at that time?

“A. No; it was my intention—

“Q. Just answer the question. You had no buildings on the place at that time?

“A. No.

“Q. And you weren’t using it for any purpose in connection with the cannery?

“A. No; I intended using it for that purpose.

“Q. And I say at that time there was nothing on the property at all but a little bit of a shack?

“A. Yes; intended to use it as a fishing station.

(P. R. 279.) “Q. (By the COURT.) And I further understand you to say that it was about the only place within that cove where a trap could be constructed?

“A. That is what I have been told by several people who had the building of the trap there; also my own men who had made soundings there.

“Q. You think the trap is built in a workmanlike manner, do you?

“A. I think so; yes.

“Q. Now, if you should prevail in this suit you would build your trap in the same place?

“A. I suppose if going to build a trap there, have to put it there, because no other place.

“Q. Now, if you had a trap there, wouldn’t it be just as difficult for you to get in to the upland as if another man had it?

“A. I suppose it would. The question would be with me whether it would be better for me to have a trap there or use it for a mooring grounds.

“Q. For a mooring grounds. Now, what is the purpose of your acquisition of this upland? Isn’t it for the purpose of acquiring that up-

land in order to command the property in front of it for the purpose of a trap? Isn't that the sum and substance of this controversy?

"A. That is probable, outside the mere fact that I am able, you know, to use it for any purpose I wish.

"Q. Yes; but I understood you to say that prior to the acquisition of this land from Robertson that you intended to locate this very place as a trap-site yourself?

"A. But that was before Alexander had built his trap. I didn't know where the particular place was; whether could build at any other place or not; but it is evident from what I have heard that is the only place where it would be practicable to build a trap—just where the Alaska Packers were and where they are now.

(P. R. 288.) "Q. Well, now, just answer my question. If your counsel hadn't advised you it was necessary to protect your property that you build a wharf, you wouldn't have thought of building any wharf out there, would you?

"A. Possibly not that quickly or at the present time.

(P. R. 289.) "Q. Yes, you may have needed the wharf if you had put a cannery there and a lot of other things there; of course, have to have a wharf to get in, but you didn't intend to build a cannery there then—you had no intention to build a cannery?

"A. No; I had no intention of building a cannery, but I wanted a fish station there.

(P. R. 291.) “Q. If this Court gives you this property, are you going to build a wharf out there or a fish-trap?

“A. I will build a wharf out there.

(P. R. 300-1.) “Q. (By Mr. JENNINGS.) That is what you are going to do with this five acres of land you have got there instead of building a fish-trap?

“A. I don’t know that I would. Then, I can, of course, do what I wish with the upland and I think I will build a wharf there.

“Q. You think you will build one?

“A. Well, I will qualify that. I will say I am going to build a wharf there.

“Q. Now, you are going to build one?

“A. Yes.

“Q. You are not going to have a fish-trap there at all? A. No, not this year.

“Q. And you are just going to convert that into a place to store combustibles and abandon the fish-trap idea all together? A. Yes.

(P. R. 307.) “Q. But I say it would be ten miles out of the way if you were coming around this way to Juneau?

“A. Well, Mr. Cheney, you don’t understand me for you don’t know anything about the cannery business. I have got propositions—I have got to have a line of traps below Hawk Inlet.

“Q. Well, you haven’t got any below Hawk Inlet?

“A. That wouldn’t make what I have in the future. I was out 20,000 cases last year on ac-



count of this jumping proposition—I outfitted for that.”

The foregoing testimony alone is sufficient to raise a doubt in the mind of any Court, not only as to the good faith of the appellant but also as to his credibility. But when we consider that the trial Court, after noting the demeanor of the witness all through the trial, makes the statement found in its opinion (P. R. 728), to the effect that the principal object of the plaintiff is securing title to the tract of land described in the complaint was to enable him to control the fishing site in front of his upland, such statement removes all doubt of the fact that the sole object and purpose of appellant in this suit is to secure the trap-site for his own use and benefit. The statement referred to above is as follows:

“It is true, as the plaintiff says, he may be able to use, and probably can use, such upland for other purposes, but it is apparent from the plaintiff’s own testimony that his main purpose in securing title to such property was to enable him to hold the frontage for the purpose of erecting a fish-trap and enjoying the sole right to fish by any stationary appliance between his upland and deep water navigation. However the pleadings in this case may differ from the pleadings in the Hampton case, it is obvious that the object of both suits is the same, to wit, to enable the plaintiff to enjoy exclusive fishing rights in front of his upland holdings.”

Upon the question of the good faith of party seeking an injunction, see

McCarthy vs. Bunker Hill & Sullivan Mining Co., 147 Fed. 981,

where on the middle of page 983, District Judge Beatty says:

“A man must have some reason for his belief before asserting it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation. It must be concluded either that these complainants intended to deceive the Court or were themselves deceived by their own culpable negligence. In either event a court of equity would not be justified in granting the relief they ask.”

As bearing upon the question of knowledge gained from a personal examination and inspection of the premises by the chancellor, I quote from same opinion on the page following:

“Since the former hearing over 1,400 pages of testimony have been taken, which with the oral arguments and the carefully prepared and able briefs of counsel were, at the last term of court, submitted for consideration. After examination of the same, a different conclusion from that before reached would not be justified.

Even if this testimony could be held as changing the former testimony by affidavits, I know from my personal examination, made at the request of both parties as stated, what the facts are as to the real damage or injury, so far as disclosed by inspection of the premises. It is admitted that, for the preservation of possible rights, Courts may grant temporary restraining orders upon testimony which is not convincing, but they will not grant a permanent injunction, except on the clear establishment of those facts which justify it. It is not necessary to here review the testimony, but it is held insufficient to establish the alleged injury to complainants or to authorize the injunction asked."

I would be content to close this brief here were it not for the fact that upon the oral argument before this Court on October 25th and also in an amended and supplemental brief served upon me on that date, counsel for appellant have raised and argued another and entirely new question: a question neither mentioned in the pleadings nor argued in the lower court.

On page 30 of said amended and supplemental brief, counsel quotes the statute of June 26, 1906, being an act passed for the protection and regulation of the fisheries of Alaska, and on the page following, counsel says:

"We contend that congress, by the passage of the act in question, recognized the right of parties to fish in Alaskan waters by means of fish-traps, and so forth, and furnished a protection

to anyone who has commenced the construction of a fish-trap or initiated a right to a fishing-trap location, and the force and effect of the statute or act in question is tantamount to granting the privilege of building and constructing fish-traps in the waters of Alaska, and that any person who has initiated the right to a fish-trap location or commenced the construction of a fish-trap, if prior in time, will be prior in right. The appellant in the case before the Court was prior in time, by reason of having purchased the location in question from the A. P. A. Co. and driven some piles and placed a notice thereon, and for these reasons, we contend, that, leaving out the question of an upland owner being entitled to free access to navigable waters bordering upon his land, Barron in this case has a prior right to the fish-trap location as against Alexander, the appellee.”

In view of the record in this case, the foregoing statement of counsel is an absurd and most astounding proposition. It is a desperate attempt of a drowning man to save himself by grasping a straw. What are the facts? The printed record shows that in 1908 the Alaska Packers' Association operated a fish-trap in approximately the same place now occupied by the trap of the appellee; that this trap was washed out by the action of the sea and was never rebuilt; that no trap was located there during the years 1909 and 1910 (Testimony of Alexander, P. R. 667-682, and testimony of Barron, P. R. 195, 196); that in 1910, appellant leased the site and attempted

to purchase the same but the Alaska Packers' Association refused to sell. (See testimony of Jas. T. Barron, P. R. 198, 199, as follows:)

“Q. (By Mr. WINN.) Now, I will ask you if you had any adjustment or settlement of any claim that the Alaska Packers' Association made to any of the grounds in front of this survey 804? (182.)

“A. Yes; I leased it in 1910. They gave me a lease. That same time I went down to San Francisco and they didn't care about giving me a quitclaim deed for it, because they wasn't quite certain they would abandon all their rights of fishing grounds in this district. So, they said they would lease it to me for a nominal sum for a year and then we would make further adjustment. Later why they concluded they were not going to use their grounds.”

The foregoing is the only testimony to be found in the record upon this point, and shows conclusively that the Alaska Packers' Association refused to sell the trap-site to Mr. Barron.

It is true, however, that Mr. V. A. Robertson, in his quitclaim deed to Barron (P. R. 142, 143) attempted to convey the rights of the Alaska Packers' Association to Barron, but as Robertson had no authority to deed property belonging to that company, such recital in the deed is mere surplusage.

If the Act of June 26, 1906, has any bearing upon this case and affords any protection to anyone, and if, as counsel says, the first in time is first in right, then Mr. Alexander, the appellee, is entitled to the



benefit of that statute, and being first in time he has the prior right. The testimony shows that both appellee and appellant had knowledge of this valuable trap-site location for two years while it remained vacant and unoccupied by anyone, and that appellee was the first to take advantage of this knowledge by constructing his trap. "Equity aids the vigilant and not those who slumber on their rights."

There is no provision of law under which anyone can *locate* a trap-site in the waters of Alaska. Three piles driven by Mr. Barron in the waters of Chatham Straits in the year of 1910 cannot be claimed to constitute a fish-trap within the meaning of the Act of June 26, 1906.

The decision of this Honorable Court in

Columbia Canning Co. vs. Hampton, 161 Fed.  
60,

the only case on all-fours with the case now under consideration, should, I believe, govern the Court in its decision here.

As to rights of fishing in general in the public waters, and particularly as to the ownership of the uplands controlling fishing rights on the foreshore, see

Pacific Steam Whaling Co. vs. Alaska Packers' Association, 72 Pac. 161.

Respectfully submitted,

Z. R. CHENEY,  
Attorney for Appellee.



In the United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

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JAMES T. BARRON,  
Appellant,  
vs.  
CLAIRE J. ALEXANDER,  
Appellee.

NO. 2171

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Upon Appeal From the United States District Court  
For the District of Alaska,  
Division No. 1.

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**Reply Brief of Appellant**

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JNO. R. WINN and  
N. L. BURTON,  
Attorneys for Appellant.



## REPLY BRIEF OF APPELLANT.

The motion of appellant, supported by the affidavit of Z. R. Cheney, to strike the affidavit of Jno. R. Winn from the files and records in this case, was served on our Mr. Burton, in Juneau, Alaska, on the date mentioned in the admission of service on the back of same, and our Mr. Winn was absent in the East at that time and did not return to Juneau or receive the motion and affidavit of Mr. Cheney until after the oral argument was made and the brief in chief of appellee filed herein, hence, this is the first opportunity that we have had to state our views upon and in relation to this motion and affidavit.

The record does not show that the affidavit moved against was ever served. It does appear, however, from said affidavit of Z. R. Cheney, that both he and Mr. Jennings, who were counsel of record for defendant, at the time were absent from the town of Juneau, one being in Fairbanks, Alaska, and the other in Baltimore, Maryland. No other attorney had been substituted for these two attorneys of appellee, hence, there was no attorney nearer than Fairbanks, Alaska, or Baltimore, Maryland, upon whom legal service could be made at the time of filing this affidavit of Jno. R. Winn.



The affidavit which is moved against is found in V. 1, p. 718 of the record. On the 19th day of November, this year, we were handed, by counsel for appellee, a copy of an affidavit by Alexander, which said affidavit is intended to bolster up Cheney's affidavit. We are of the opinion that it is too late now for the appellee to file any affidavits for the purpose in question, but in case that this honorable Court is of the opinion that it is not too late for the filing of this Alexander affidavit, we tender herewith, and wish to have filed, the affidavits of Lloyd G. Hill, Captain E. Thornton and Charles Carlson, covering the matters set out in the affidavits of Cheney and Alexander. The affidavit of Hill was made and served on counsel for appellee before the oral argument was made in this case before this honorable Court, but our Mr. Winn had not at that time received the same on account of his absence from Juneau, as hereinabove stated, and this is the reason for not tendering it for filing until now.

It is not contended in either of the affidavits of appellee that any portion of the said affidavit of Jno. R. Winn is untrue, except the following portion: "When we arrived at the fish trap location of appellant, referred to in the complaint herein, the said defendant\*\*\*\*\*had destroyed the evidence and manner in which the fish trap described and set up in the complaint was constructed." This seems to be the only objectionable feature to the affidavit in question, except, perhaps, the further statement contained therein, to-wit: "Alexander had

partially constructed another fish trap directly in front of appellant's upland property," and in regard to this last clause of the affidavit, there is no question but what it is true, for the court has so stated in its written opinion and the order made herein over-ruling the motion for a new trial, that is, unquestionably a new lead to the fish trap had been constructed in front of Barron's property. Cheney in his own affidavit above referred to, states as follows, referring to the time of the visit by the Court to the premises: "*Alexander had torn down only a part of the body of said fish trap and had constructed a new lead line pointing in the direction, etc.*"

This affidavit of Jno. R. Winn was filed, not so much in support of the motion for a new trial, as it was to show under what circumstances the trial Judge visited the premises. We do not know whether the facts set up therein amount to a great deal or not, for the reason that it appears conclusively from the record that there had been a change in the fish trap structure between the time of the trial of the case and the visit of the Court to the premises; and these several affidavits could only enlarge and add to the record in this respect, and tend to show the *mala fides* of the appellee in destroying the physical condition and situs of the fish trap, which formed the issue in the case, and upon which evidence was introduced in support thereof, thus defeating the very object of the trial Court's visit to the premises, viz: to see those things which were

in issue and had been testified concerning, and for the purpose of better enabling the Court to understand and apply the evidence which had been submitted to it upon the trial of the case. Alexander did this in face of the fact that he knew that the Court expected to make this visit for the purpose above indicated. (See Alexander's affidavit filed in support of the motion to strike.) Appellant's affidavits tendered herewith, and the facts contained therein, tend to give great weight to what we have already argued in our brief in chief, that is: *That the Court's final judgment and decision herein was rendered concerning another and different fish trap than the one set up in the amended and supplemental complaint. Or that the change in the condition of the structure brought about by Alexander, and as seen by the Court, had great weight with the Court in arriving at its final decision and judgment herein.* However, irrespective of these affidavits, we have stated, it clearly appears from the opinion of the Court, and its order over-ruling the motion for new trial, that the changes complained of, or at least part of them, were made by appellee between the time of the trial of the case and the visit of the Court to the premises. For the purposes above indicated, we hope that this honorable Court will see its way clear to receive these several affidavits, and to give them such consideration and weight as they are entitled to. If they are received, we have clearly shown by them that the facts set up in the affidavit of Jno. R. Winn, which is moved against, are abso-

lutely true, instead of, as stated in the affidavits of Cheney and Alexander, "absolutely false."

The Lloyd G. Hill, who has signed one of the affidavits tendered, is the same Lloyd G. Hill who testified on the trial of this case, and who made exhibit "D," which is referred to in his affidavit; and it will be gathered from the record that he is very familiar with the matters in dispute in this case. Captain E. Thornton and Charles Carlson, who signed the other affidavit, were both witnesses on the part of the plaintiff upon the trial of the case in chief, and were, and are, very familiar with the facts set forth in their affidavit. Surely the affidavits of these three disinterested parties should have greater weight with the Court than the affidavit of appellee and his counsel.

We will now proceed to reply to appellee's brief, and will follow the same order, as near as possible and practicable, that he has taken up and discussed the various points from his view of the case.

Counsel for appellee in his statement of facts or argument in nowise contradicts the statement of facts made by appellant as to the time and manner of initiation of appellant's right to the upland property bordering upon the fish trap location, that is: That V. A. Robertson took up the land contained in U. S. Survey No. 804, abutting upon the fish trap location, on October 31st, 1908, and on the 6th day of July, 1909, the survey, field notes, etc., were approved by the Surveyor General of the District of Alaska, and that the Court found on the trial of



the case that Barron was the owner of the upland; and further, that by reason of the doctrine of relation laid down in *N. W. Fisheries Co.*, 39 L. D., p. 398, Barron's title dates back to June 6th, 1909. From a perusal by the Court of the statement of the case made by appellant and appellees, we think that it will be found that appellant's statement is full and complete, and the facts therein contained substantiated by the evidence.

Counsel states that this court will not reverse or set aside the findings of fact made by the Court unless:

- a. "Some serious or important mistake has been made in the consideration of the evidence," and
- b. "An obvious error has intervened in the application of the law."

We have no particular fault to find with these two propositions of law or the authorities cited in support thereof. It is our contention, and we spent considerable amount of energy in our brief in chief upon these two very same propositions of law, that the Court erred in respect to the same. In the first place, the Court made "a serious and important mistake" in taking into consideration the change that had been made in the fish trap and rendering its judgment upon the conditions as seen by it, or being unduly influenced by the same in arriving at its final decision. Secondly: "*An obvious error HAS INTERVENED in the application of the law,*" for it



*clearly appears from the records in the case, and from what we have set forth in our brief in chief, that the Court misapplied the doctrine and force and effect of certain authorities to the case at bar; that is, the Court applied to the case at bar the principle and doctrine laid down in certain cases wherein the rights of the public, or trade and commerce, to the use of navigable waters for certain purposes are paramount rights to those of an upland owner to the use of his entire water frontage and access from every foot thereof to the same. This doctrine, we contend, does not apply to the case at bar for the reasons, as hereinbefore stated, that this suit is between two private individuals, and does not pertain to any question as to the use of navigable waters by the public, or for trade, commerce or navigation.*

Appellee (pp. 5 and 6 of his brief) correctly quotes a portion of the testimony of certain witnesses of the appellant, but on pages 7 and 8 of his brief draws what we deem some very erroneous conclusions from the testimony, as well as fails to state the facts as testified by the witnesses. For instance, counsel states: "That the testimony of appellant's witnesses, taken in connection with certain photographs and Exhibit "D," being Hill's map, (P. R. 164) \*\*\*\*\*show that there are eight feet of water at low tide at the pile in the lead of said trap nearest the shore, etc." There is no evidence or testimony of any kind in this case to support counsel's assertion. All of the witnesses, who testified upon this subject, testified differently from counsel's

statement, and stated that the depth of water at extreme low tide ranged from 1 to 4.9 feet at said place. We say, without fear of contradiction, that the following testimony and evidence IS ALL OF THE TESTIMONY AND EVIDENCE UPON THIS POINT. We do not care to burden this Court with repetitions of matters in our reply brief, but as the record is long and lengthy, we desire to assist the Court as much as possible in getting at the real facts of the case by the shortest method, and we will quote *all* of the testimony of *all* of the witnesses in respect to this matter.

The witness Hill testifies (V. 1, P. R., pp. 158 and 159) as follows:

“Q. The soundings as marked on this map or plat (referring to appellant’s Exhibit “D” (P. R. 164) are just as you found them upon the ground, or are they different?

“A. Just as I found them at that time.

“Q. Yes, now, this was what day,—the 11th of March?

“A. Yes, sir.

“Q. What depth of water did you find at the pile nearest the shore in the lead of the trap?

“A. Eight feet. Is marked on the plat.

“Q. What stage of the tide was it when you were there, Mr. Hill?

“A. Why, the tides according to the tide table would be out, I think, at 1:50 in the afternoon, the low tide, and I started making sound-

ings about 12:30. I completed them about one o'clock; so it wasn't quite—wasn't quite low tide.

“Q. Yes, now, do you know from an examination of the tide books as to whether or not the tide at that time of the month is less or greater than it is at other times of the same month? Have you examined the tide tables, and so forth, to ascertain that?

“A. Why, the tide—they were very short run-outs; not a low tide. The tide could be much lower. Take the June tides will probably run out 6 feet lower than the March tides.

“Q. Taking then at the lowest tides, approximately, would leave about how much water or depth of water where that last pile is in the lead, that is, approximately, without calculating it?

“A. Why, wouldn't be over two feet of water there at the very lowest tide.

“Q. Well, ordinary low tide?

“A. Ordinary low tide, probably be four or five feet.”

Captain Thornton testifies (pp. 434 and 435 P. R.) that if Hill's testimony is true, as above quoted, and that the depth of water at the pile nearest the shore was 8 feet on March 11, 1912, (being the day that Hill made Exhibit “D,” and his measurements) that *at extreme low tides* that it would make it less than *one foot* depth of water at the pile in Alexander's lead nearest the shore or upland of Barron.

Barron testifies (P. R. 222) as follows:

“Q. I did ask you if there was any chance, Mr. Barron, even though there was no web ever strung between that last pile and the upland, for any size of gasoline boats, or any other boats, to navigate between the upland and that pile at ordinary low tide?

“A. No; a small gasoline boat could not go there. Three big boulders there, probably three or four feet along, high; they entirely close up in between, entirely; along the shore line might get a depth of, say, four or five feet and get on top of a boulder and you would have three or four feet less of water.

“Q. I understand. When you was out there at ordinary low tide that was entirely closed up from that pile clear on up to the ordinary line of high tide. A. Yes.

“Q. No chance of getting through there unless you run through his trap? A. No.”

Birkinbine, appellee's surveyor and expert witness, testifies at pp. 557 and 558, P. R., in reference to this matter and his map and plat, which is found at P. R. 549, as follows:

“Q. Now, I will ask you, Mr. Birkinbine, what is the depth of the water represented by these figures at the last lead pile inshore of Alexander's trap, as it now stands according to your map?

“A. This is marked “minus 4.9” which means 4.9 feet below extreme tide.



“Q. That is the depth of the water as you found it at the last pile toward the shore of the trap?

“A. Yes, sir.

“Q. As it was on that date? A. Yes, sir.

“Q. (By the Court) That is the extreme low tide?

“A. That is the extreme low tide; yes, sir. I have assumed extreme low tide to be zero.

“Q. (By Mr. Cheney) Now, that—is that map made on the same scale as Mr. Hill’s map?

“A. Yes; 100 feet to the inch. That is it.

“Mr. Hill. Yes, sir.

“Q. (By Mr. Cheney) Now, if there is any difference in these two maps—I am not speaking of the tides now, but in respect to any other matters affecting the contour of the shore in front of this homestead or off here to the left where the “A” is marked and the—and the rock with the little circle in the center, please explain to the Court what the difference is between your map and Mr. Hill’s?

“A. Why, Mr. Hill, I think, shows the—a tide line about at this—about this line; that is the lowest one he shows is about what I call the average low tide.

“Q. Just a moment. Let’s get his map here so you can explain better.

“A. Yes; we get a little different shape to the end of the reef here and we get a different position for this—for this that is called end of



rock, "bare rock," which Mr. Hill calls it the end of the peninsula, and we get a little different position for the reef."

We wish also to call the Court's attention to Birkinbine's map (p. 549, P. R.) where it shows that he has marked thereon that at low tide the water would be 4.9 feet deep at the last pile in the lead of the trap nearest Barron's upland.

The foregoing being the testimony, *and all of the facts*, concerning the depth of water at this pile nearest the shore, we would like to ask what foundation has counsel for appellee, in referring to the evidence on this point, to state "It shows that there are 8 feet of water at low tide at the pile in the lead of said trap nearest the shore."

*Barron, Thornton and Hill, on the part of appellant, and Birkinbine, on the part of appellee, refute the statement of counsel.*

Again, we contend that it is a conceded fact in the case that there was a strong wire cable strung from the last pile in the lead nearest the shore in a straight line with the lead of the trap and securely fastened on the upland of Barron and web hung thereon in order to complete the lead. That this cable, so hung, constituted a part of the trap and it was just as formidable in obstructing Barron's access to his upland as that part of the lead of the trap made by the driven piles and web hung thereon. The witness Dudley states (p. 134, P. R.) that this cable extended over the tide lands from the last pile in the lead of the trap to Barron's upland,

or above high water mark. Mason testifies substantially the same as Dudley. (pp. 360 and 361, P. R.) Barron makes the same statement. (p. 206, P. R.) Last, but not least, Alexander, defendant and appellee, admits that the lead went above low water mark. (pp. 468 and 469, P. R.) *This being true, what becomes of appellee's THEORY that he had left unobstructed the navigable waters lying between the last pile in the lead and Barrow's upland?* In the face of these facts, we may also ask what becomes of the fine spun mathematical calculation of appellee's counsel, as a result of which he finds:

*"The actual average depth of waters at the lead line nearest the shore of appellee's fish trap was 19.045 feet,, and that during June, 1912, it was 15 feet. (P. 7, Appellee's Brief); and the other assertion made by counsel (p. 13, his brief), to-wit: "I have shown on page 7 of this brief, there is over 19 feet of water at the lead pile at average sea level."*

Counsel continues in his argument, (p. 8 of his brief):

*"Plaintiff's exhibit "D," as well as defendant's exhibit 4, directly contradicts the oral testimony of appellant and his witnesses upon the question of access to the uplands\*\*\*\*\*"*

Photographic evidence is considered in law very uncertain and unreliable proof. Maps and plats show nothing except as illustrative of facts testified

to. The photographs referred to are so unreliable that they make the straight timbers lying upon the shore crooked, some of them describing a semi-circle. We have never heard of a method of photography that would disclose the condition of the bottom of the sea, under water, nor have we ever known of a map or plat by which, in the absence of soundings, etc., one could determine whether a particular body of water is navigable or not. Much less, could these exhibits demonstrate the fact as to whether or not Barron's right of way out to navigable water had been obstructed by Alexander's fish trap. Could these poor mute maps and photographs furnish expert testimony as to whether or not certain steamers or water-crafts could safely be piloted into Barron's land with Alexander's fish trap in place? The matter of navigation we contend is a science, and as to whether or not water-crafts could safely reach Barron's upland with the fish trap in place is a matter of proof by testimony of expert witnesses such as Mason, Thornton, Carlson and Barron, all of whom testified in this case, as against counsel's contention and against the silent photographs and plats referred to by him, if they show what he contends they do. Nor could Birkinbine, leisurely walking along the shore in front of Barron's property, with his surveying instrument on his shoulder, determine as to whether or not boats could be landed and Barron's land reached from the waters on the east side of the trap, nor could his parade in any wise contradict the positive testimony

of Mason, Thornton, Carlson and Barron to the effect that this fish trap cuts off Barron's access to his upland and leaves no suitable place for Barron's gateway out to the seas. Birkinbine testifies that he made no soundings on the east side of the trap, so he did not know the depth of water nor the condition of the bottom of the sea in that respect. (P. R. 625) also first brief p. 62.)

As stated in our brief in chief, (p. 77) the uncontradicted proof in this case clearly shows that the only reasonable, feasible and practicable place for landing of steamers or water-craft has been entirely destroyed and cut off from Barron's upland by Alexander's structure, and as we have shown there, even the *defendant* admits that he had obstructed from 200 to 600 feet of Barron's shore land and in his own language states "*at the most natural place for landing of boats.*" (P. R. 471.)

The answering brief of appellee in nowise denies these matters that we so cogently urged in our brief in chief. And right here we would like to state that it will further appear from the record ( V. II., p. 294) that the Trial Judge evidently took the view that notwithstanding that we could show that the "*only feasible and practicable*" entrance to the upland of appellant was obstructed by the fish trap, that appellant has no remedy unless he was going to use such access; in other words, that this littoral right must be exercised before it is available, clearly indicating that the right did not exist as "property" but unless appellant was ready to use such right,



some stranger could come in and take it away from him and an injunction could not be sustained unless immediate use of such littoral right could be shown. The Trial Judge indicated as much when we were endeavoring to show that the only reasonable place for reaching appellant's land from the water had been obstructed by the actions of appellee. However, should this be the law, we have shown beyond any question that this little sand beach, lying on the westerly side of the trap, had been used by Barron as a landing or anchoring place before Alexander came on the scene.

We do not care to reply to the authorities cited by counsel for the reason that most of them are decisions by this honorable Court and we referred to the same cases in our brief in chief, and endeavored to show the applicability or inapplicability of these cases to the case at bar, and deem any further comment unnecessary, except we may refer to the Columbia Canning Co. case further on, as the appellee seems to think that that case is on "all-fours" with the present one. Appellee's counsel, in referring to what we contend are our littoral rights, and water front privileges, says:

"I suggest that counsel's position is unique in the history of the law concerning littoral rights."

This assertion was made by counsel in refutation of our statement in our former brief that Barron's right of way out to deep water would only control that part of the shore land and water lying



between the prolongation of the end lines of Survey No. 804. We know of nothing unique about the position we have taken in this respect. Authorities hold that in case of dispute arising between adjoining upland owners as to the waterfront that each is entitled to control, that portion which lies immediately in front of his upland, in case the shore line is straight; and in case the upland borders upon a semi-circular bay, and the above kind of division is impossible, then the court will make an equitable devision of the tide lands, etc., in front of the property owned by the respective parties; hence, we contend that in the case at bar we can only consider as to whether or not Barron's right of way in *front of his property has been obstructed*.

Counsel further states (p. 17 of his brief) as follows:

*"However, from a perusal of the testimony upon cross-examination of P. H. Mason it does appear, at least by inference, that the appellee at the time of the trial contemplated changing the lead of the trap from the way it was then driven to the position in which the Court saw it at the time of his visit to the premises."*

Then he proceeds to quote from Mason's testimony certain questions, which appellee's counsel propounded him, and the answers thereto, in support of the statement which counsel made. Counsel for appellee talks "about astounding propositions" but all the astounding propositions, which

we have ever heard of, dwarf into insignificance when compared with the statement which counsel here makes. In other words, it is shown by all the proof in the case, and the testimony of various witnesses, which we have set forth in our brief in chief, that the appellee in the first instance, and on the hearing to dissolve the preliminary injunction granted by the Trial Court, contended, and so testified, that his trap then was complete and he could not drive piles any further inshore, and that the reason that the fish trap and lead did not interfere with Barron's access to his upland was that there was a distance of 500 or 600 feet between the nearest inshore pile and Barron's upland. (P. R., p. 468.) That immediately upon the dissolution of the temporary restraining order, which order was based on evidence of this nature, Alexander immediately found out that he could drive further inshore, and on advice of his attorney, that he (Alexander) had as much right to the upland as Barron, the lead was extended 261 feet further inshore towards Barron's upland. (See brief in chief of appellant, p. 60.) Then upon the trial of the case in chief, Alexander testifies that that was the only place in which he could drive a lead line—that he knew this by experience that he had gained while working for the Alaska Packers' Association and driving a trap on the same location. Then, Alexander, following, as we presume, his counsel's advice, that the evidence given before the Trial Court showed that the fish trap, as then constructed, was

a nuisance to Barron, undertakes to play hocus-pocus or hide-and-go-seek with the Court, rushes out and again makes a change in the structure in question. And counsel states that they were contemplating such a change when the trial was going on before Judge Lyons! We would like to ask counsel if this is fair practice? Or if such contemplated change was a triable issue in the case, or in any manner binds the appellant by any decree that could be rendered in this case? Such contemplated change if consummated would raise a new issue, upon which another and different cause of action might be predicated.

Should this practice prevail, and we should now go to trial upon the question as to whether or not the fish trap, as *it is now* constructed,, interferes with Barron's free access to his upland, and in the middle of the trial, or after the trial, the appellee was convinced that it did, and the court was called upon to visit the premises, and, in the meantime, appellee made another change in his structure, we would continue on these trials ad infinitum. We do not think that such practice should be tolerated by the Courts.

Counsel further contends that Barron had no title to the fish trap location, save and except that which he purchased from Robertson. This is not true. It appears from the evidence that, in the first instance, Barron leased the fish trap site from the Alaska Packers' Association for the year of 1910, as they were not, at that time, willing to sell. (pp. 97, 98

and 99, P. R.) That he did not fish the location that season for the reason that Robertson owned the upland. Barron then pursued the course of buying both Robertson's upland and the fish trap location, and sometime in the arly spring of 1911, succeeded in closing the deal with Robertson for the upland and with the Alaska Packers' Association for the fish trap location. P. R., pp. 258, 309 and 310.) Barron drove some piles upon the location in 1910, and placed a notice thereon that he claimed the same. Early in the spring of 1911, Barron contemplated building upon the location for some purpose, and Alexander rushes in and commences the erection of his structure. He was immediately notified of Barron's rights in the premises by Mr. Barker, the superintendent of Barron's cannery, and saw the piles upon the ground and the notice still attached thereto, and Barker served Alexander with the notice found at page 753 of the record.

The foregoing facts, as detailed, being true, we are unable to understand that our relying upon the Statute of June 26th, 1906, (cited on page 30 of our Supplemental Brief) is, as counsel has stated, "an absurd and most astounding proposition, etc.," We do not care to reiterate our argument on this point, as we have given the Court what, in our opinion, should be the construction placed upon the Statute last mentioned.

Appellee, in his brief, has taken up several pages in quoting from some of Barron's testimony. We submit that this is only an isolated portion of the



witnessess' story, as given in court, and should be considered with all of his testimony given, and when this is done, and taken in connection with the other evidence in the case, the Court will find, as we have stated before, that Barron had been using the waters in front of his upland for anchoring purposes and as a harbor of safety before Alexander ever initiated any rights or made any claim to the fish trap location in controversy. We do not think that the *purpose* for which this ground was taken up by Barron is at all material. If he has acquired title from the Government, as the Trial Court has found, then he could and can use his property, including the tide land and water in front thereof, for whatever purposes he desires, so far as the appellee is concerned. The littoral rights attached at the time of the approval of Survey No. 804. Whether Barron used the water in front of his upland property or intends to use it, for anchoring, wharf or fish trap purposes, is no concern of the appellee.

Appellee relies on the Columbia Canning Company's case, (161 Fed., p. 60) for an affirmance of the case at bar, and contends that the cases are parallel. In our oral argument before this Court, we attempted to show the inapplicability of the doctrine laid down in the Columbia Canning Company's case to this case. Judge Morrow, speaking for the Court in the Columbia Canning Company's case says:

"It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, un-



der the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark. He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case. The plaintiff does not charge that defendants' structure is a nuisance, or that the defendants are obstructing him in having access to the navigable waters of Lynn Canal. The charge is that defendants are erecting on the shore a structure of piles for a fish trap which will be an obstruction to a similar structure which the plaintiff had commenced to erect. This is not the statement of a cause of action under the general law relating to littoral rights, nor under any statute relating to the waters of Alaska to which our attention has been called." (pp. 64 and 65.)

The case at bar( leaving out the question of the Statute of June 26th, 1906) is predicated entirely

*"Against an intruder who has placed an obstacle on the shore (and in the waters) that prevents the upland owner from having access to navigable waters;"*

Hence, the case at bar does not come within the doctrine laid down in the Columbia Canning Company's case.

We desire to again state that the Trial Court either rendered a decision and final judgment upon the fish trap structure which Alexander rebuilt between the time of the close of the trial and the visit of the Judge to the premises in controversy, or that the Court misapplied the information gathered from such change, and was so influenced by the same, that the relief prayed for by appellant was denied. The Judge states, in his written opinion, to-wit:

“Since the hearing of this trial, however, the Judge of this Court in company with the counsel for both the plaintiff and the defendant has had an opportunity to visit the situs of the fish trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed so that, instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits.” (P. R., p. 742.)

On reading this part of the Judge's opinion, it certainly would impress any one that he had some question in his mind or some doubt in his mind con-

cerning the relief that should be granted to appellant; that is, he thought that the structure complained of in the amended and supplemented complaint did interfere with plaintiff's right of access from every point of his upland to navigable waters; but that the new structure did not. He further says in his opinion:

"For the reasons herein assigned this action should be dismissed." (P. R., p. 743.)

One of the reasons, then, for the dismissal of the action was "*that the lead line of the defendant's trap had been changed.*"

Then, too, in the order made by the Trial Judge in over-ruling the motion for a new trial, he states as follows:

"The change made in the construction of the fish trap by the said defendant does not cause the same to in any wise interfere with plaintiff's free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof, or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits."

In conclusion, allow us to say that the judgment and decree of the Trial Court in dismissing this action should be reversed and the relief prayed for in the amended and supplemental complaint herein granted for the following reasons, to-wit:

- a. If the Statute of June 26th, 1906, cited in

our brief, applies, then we were first in time and should be first in right.

b. It conclusively appears from the evidence in said cause, *and the admission of the appellee*, that the fish trap structure, complained of in the Amended and Supplemented Complaint did obstruct and cut off appellant's ingress and egress to and from the navigable waters of Chatham Straits and his upland.

c. It conclusively appears from the evidence in said cause *and the admission of appellee* that the only practicable and feasible place upon the upland of appellant from which access to the navigable waters of Chatham Straits can be reached is directly fronted and obstructed by the fish trap structure of appellee.

d. It conclusively appears from all the evidence in said cause that any and all reasonable access to the navigable waters of Chatham Straits from the upland of appellant was cut off by the erection and construction of the fish trap of appellee, as complained of in the Amended and Supplemented Complaint.

e. It is held by the Trial Court that the appellant is the owner in fee of the upland, and the littoral rights attached to such upland, and we contend that this is such a "property right" that the appellant can not be deprived thereof.

f. That the Trial Court committed error in tak-

ing into consideration any other or different structure than the one complained of in the Amended and Supplemental Complaint, and that such consideration is reversible error.

Respectfully submitted,

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